No. 88-7146-CSY
Status: GRANTED
CAPITAL CASE

Docketed:
May 3, 1989

See also:
87-6927
89-5765

Title: Jonas H. Whitmore, individually and as next friend of Ronald Gene Simmons
v.
Arkansas, et al.

Court: Supreme Court of Arkansas

Counsel for petitioner: Allen,Arthur L.

Counsel for respondent: Miller,Clint, Harris,John

Entry	Date	Note	Proceedings and Orders
1	Mar 14 1989	G	Application (A88-727) for a stay of execution of sentence of death, submitted to Justice Blackmun.
2	Mar 14 1989		Application (A88-727) referred to the Court by Justice Blackmun.
3	Mar 15 1989		Application (A88-727) granted by the Court. "The application for stay of execution of sentence of death presented to Justice Blackmun and by him referred to the Court is granted pending the timely filing and disposition by this Court of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court."
4	May 3 1989	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
6	May 15 1989	D	Motion of respondent Simmons for oral argument filed.
7	May 15 1989	D	Motion of respondent Simmons for expedited review filed.
8	May 15 1989	D	Motion of respondent Simmons to require petitioner to post bond filed.
9	May 15 1989	D	Motion of respondent Simmons to be present at oral argument filed.
10	May 19 1989		DISTRIBUTED. May 25, 1989. (The above four motions of respondent Simmons).
15	May 22 1989		Brief of respondent Ronald Gene Simmons, Sr. in opposition filed.
11	May 30 1989		Motion of respondent Simmons for expedited review DENIED.
12	May 30 1989		Motion of respondent Simmons for oral argument DENIED.
13	May 30 1989		Motion of respondent Simmons to be present at oral argument DENIED.
14	May 30 1989		Motion of respondent Simmons to require petitioner to post bond DENIED.
16	Jun 1 1989		Brief of respondent in opposition filed.
17	Jun 7 1989		DISTRIBUTED. June 22, 1989
18	Jun 23 1989		REDISTRIBUTED. June 29, 1989
20	Jul 3 1989		Petition GRANTED.
			**********
21	Aug 9 1989	D	Motion of respondents for divided argument and for additional time for oral argument filed.
22	Aug 10 1989		Opposition of petitioner to motion of respondents for divided argument and for additional time for oral

No. 88-7146-CSY

Entry	Date	Note	Proceedings and Orders
			argument filed.
27	Aug 14 1989	G	Motion of petitioner for appointment of counsel filed.
25	Aug 15 1989		Brief of petitioner Jonas H. Whitmore filed.
26	Aug 15 1989		Joint appendix filed.
24	Aug 23 1989		Order extending time to file brief of respondent on the merits until October 10, 1989.
28	Sep 25 1989		Motion of respondents for divided argument and for additional time for oral argument DENIED.
30	Sep 26 1989		Brief of respondent Roanld Gene Simmons, Sr. filed.
29	Oct 2 1989		Motion for appointment of counsel GRANTED and it is ordered that Arthur L. Allen, Esquire, of Little Rock, Arkansas, is appointed to serve as counsel for the petitioner in this case.
31	Oct 10 1989	G	Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae filed.
32	Oct 10 1989		Brief of respondent Arkansas filed.
33	Oct 10 1989		Brief amici curiae of Missouri, et al. filed.
34	Oct 30 1989		Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae GRANTED.
36	Nov 27 1989		SET FOR ARGUMENT WEDNESDAY, JANUARY 10, 1990. (3RD CASE)
37	Nov 30 1989		CIRCULATED.
39	Jan 2 1990	G	Motion of respondent Arkansas' counsel to be designated to present oral argument on behalf of both respondents filed.
40	Jan 8 1990		Motion of respondent Arkansas' counsel to be designated to present oral argument on behalf of both respondents GRANTED. The request for divided argument is denied.
41	Jan 10 1990		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

88-7146

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

JONAS H. WHITMORE,
INDIVIDUALLY AND AS
NEXT FRIEND OF
RONALD GENE SIMMONS — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED

I.

Does the Constitutional ban against cruel and unusual punishment require that a mandatory appellate review be conducted in all cases in which the death penalty has been imposed?

II.

If mandatory appellate review of death penalty sentences is Constitutionally required, may that issue be raised by a third party?

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Appendix D - Texts of the statutes Ark. Code Ann. §5-4-601 through 5-4-617; Ark. Code Ann. §5-10-101; Ark. Rules Crim. Pro., Rule 36.1; Ark. Rules Crim. Pro., Rule 36.24; Ark. Rules Crim. Pro., Rule 36.25; Ark. Rules Crim. Pro., Rule 36.26; Ark. Supreme Ct. Rules, Rule 11(f); Ark. Supreme Ct. Rules, Rule 11(h)

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

JONAS H. WHITMORE,
INDIVIDUALLY AND AS
NEXT FRIEND OF
RONALD GENE SIMMONS — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARKANSAS

Petitioner, Jonas H. Whitmore, individually and as next friend of Ronald Gene Simmons, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas entered in this proceeding on March 13, 1989, in which Petitioner Whitmore was denied the right to intervene in behalf of Ronald Gene Simmons, an Arkansas inmate scheduled to die by lethal injection. Simmons had refused to appeal both this conviction and an earlier conviction for which he was also sentenced to death by lethal injection.

CITATION TO OPINIONS BELOW

The opinion of the Arkansas Supreme Court in Franz, Individually and as Next Friend of Ronald Gene Simmons v. State (July 11, 1988) is reproduced as Appendix A hereto and is reported at 296 Ark. 181 (1988).

The opinion of the Arkansas Supreme Court in Simmons v. State (March 10, 1989) is reproduced as Appendix B hereto and is reported at 298 Ark. 193 (1989).

The opinion of the Arkansas Supreme Court in Whitmore, Individually and as Next Friend of Ronald Gene Simmons v. State (March 13, 1989) is reproduced as Appendix C hereto and is reported at 298 Ark. 255 (1989).

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on March 10, 1989, which allowed Ronald Gene Simmons to waive his direct appeal of the imposition of the death penalty, and a motion by Petitioner Whitmore to intervene and to stay the execution was denied on March 13, 1989. On March 15, 1989, this Court granted a stay of the execution of Ronald Gene Simmons pending the timely filing of a petition for writ of certiorari. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), the Petitioner asserting herein, and having asserted below, a deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, which provide, in relevant part:

> [Nor shall any person] be deprived of life, liberty, or property without due process of law. . .
>
> Fifth Amendment

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> Eighth Amendment

> [Nor] shall any state deprive any person of life, liberty, or property without due process of law. . .
>
> Fourteenth Amendment

The case also involves the Arkansas capital murder statutory scheme (Ark. Code Ann. §§5-4-601 through 5-4-617 and 5-10-101); Arkansas Rules of Criminal Procedure, Rule 36.1, 36.24, 36.25 and 36.26; and Rule 11(f) and (h) of the Rules of the Arkansas Supreme Court; the text of each being attached hereto as Appendix D.

STATEMENT OF THE CASE

On February 10, 1989, Ronald Gene Simmons (hereinafter "Simmons") was convicted of capital murder (Ark. Code Anno. §5-10-101) for the deaths of fourteen family members and sentenced by the jury to death. Simmons expressed his desire that the sentence be carried out without appellate review of the trial. Simmons v. State, 298 Ark. 193 (1989).

Simmons had previously been convicted on May 16, 1988, of capital murder and sentenced to death, at which time he expressed his desire that "absolutely no action by anyone be taken to appeal or in any way change this sentence". Franz v. State, 296 Ark. 181, 183 (1988). This earlier case will hereinafter be referred to as "Simmons I" while the latter case which is the subject of this petition will be referred to as "Simmons II" when such distinction is necessary for clarity.

The trial court in Simmons I conducted a hearing to determine whether Simmons was mentally competent to waive his right to appeal and whether such waiver was knowingly and intelligently made. Following a finding by the trial court of competency and knowing and intelligent waiver, an execution date was set. At this point, Rev. Louis Franz, a catholic priest who ministers to Arkansas death row inmates petitioned the Arkansas Supreme Court to intervene as next-friend and for a stay of execution. Franz v. State, 296 Ark. at 183.

The Arkansas Supreme Court stayed the execution and requested the parties to brief the following issues: (1) whether the intervenor, Franz, had standing; (2) whether

Arkansas should adopt a rule for mandatory review of death cases; (3) whether, if mandatory review is not required, a review should be conducted of the waiver of appeal; and (4) whether Simmons had knowingly and intelligently made such waiver. Franz, Id. at 183-184.

The Arkansas Supreme Court, in ruling upon this case of first impression, was unanimous in finding that Rev. Franz lacked standing to raise the issue of the absence of a mandatory appeal in death penalty cases. The court based its holding to this question on the precedents of Gilmore v. Utah, 429 U.S. 1012 (1976); Lenhard v. Wolff, 443 U.S. 1306, stay of execution denied 444 U.S. 807 (1979); and Davis v. Austin, 492 F.Supp. 273 (N.D.Ga. 1980).

Despite its holding on lack on standing, the court reached the issue of the constitutionality of absence of mandatory appeal, and, with two members dissenting, found no constitutional violation. The court in finding no requirement for mandatory appeal, saw no conflict with its own Rule 11(f) or Arkansas Rules of Criminal Procedure, Rule 36.24, both of which impose an obligation upon it to "review all errors prejudicial to the rights of a [death penalty defendant]". The text of these provisions is set out in Appendix D hereto.

The Arkansas Supreme Court then established a rule for future cases:

> . . . .when a lower court has made a determination that a capital defendant can make a knowing and intelligent waiver of appeal, and has done so, the State has the burden of bringing the record of the lower court proceeding on this issue to this Court for review. . . it must be lodged at least seven days before the execution date. We will then review the proceeding to determine whether the defendant had the capacity to understand the choice between life and death and to knowingly and intelligently waive his rights to appeal his sentence of death.
>
> Franz, Id. at 189-190.

A federal habeas petition was then filed by Rev. Franz (Franz v. Lockhart, 700 F.Supp. 1005 (E.D. Ark. 1988))

alleging, inter alia, the unconstitutionality of the Arkansas death penalty statutes (Ark. code Anno. §§5-4-601 through 617 and 5-10-101) for their failure to provide mandatory appellate review. On September 23, 1988, the U.S. District Court, Hon. G. Thomas Eisele, Judge, issued an Opinion and Order finding the absence of mandatory appeal to be constitutionally defective but also finding that Rev. Franz had no standing to raise the issue in behalf of Simmons. The petition for habeas in Simmons I was thus denied and is currently on appeal to the United States Court of Appeals for the Eighth Circuit.

Against this legal backdrop, following his conviction on February 10, 1989, Simmons petitioned the Arkansas Supreme Court for an expedited review of his waiver of appeal in accordance with its earlier holding in Franz v. State. On March 10, 1989, the Arkansas Supreme Court found the waiver to be knowingly and intelligently made (Simmons v. State, 298 Ark. 193 (1989) and that the execution scheduled for March 16, 1989, could proceed. That opinion is appended hereto as Appendix B.

On March 13, 1989, Jonas H. Whitmore filed a motion with the Arkansas Supreme Court to intervene and for stay of execution, individually and as next friend of Ronald Gene Simmons. Whitmore is an inmate on Arkansas death row whose conviction and sentence have been affirmed on direct appeal, Whitmore v. State, 296 Ark. 308 (1988). On March 13, 1989, the Arkansas Supreme Court issued a per curiam opinion denying the motion by Whitmore based upon his lack of standing. Simmons v. State, 298 Ark. 255 (1989). A copy of Whitmore's petition is attached hereto as Appendix E and the decision of the Arkansas Supreme Court denying intervention is appended hereto as Appendix C.

On March 15, 1989, a stay of execution pending the filing of a petition for writ of certiorari was granted by this Court (A-727).

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DETERMINE

WHETHER THE EIGHTH AMENDMENT'S BAN AGAINST CRUEL AND UNUSUAL PUNISHMENT REQUIRES THAT A MANDATORY APPELLATE REVIEW BE CONDUCTED WHEN A SENTENCE OF DEATH IS IMPOSED AND TO DETERMINE WHETHER A THIRD-PARTY MAY ASSERT SUCH CONSTITUTIONAL RIGHT IN BEHALF OF THE PERSON SENTENCED.

A. MANDATORY APPEAL

As used herein, Petitioner would define "mandatory appeal" as being one which may not be waived by the defendant; this is in contrast to "automatic appeal" which a defendant may not be precluded from pursuing but which he may knowingly and intelligently waive. Arkansas provides "automatic appeal" of all criminal cases, including capital cases. Franz v. State, 296 Ark. 181 (1988).

Of the 37 states authorizing capital punishment, apparently only Arkansas fails to provide for mandatory appellate review of either the entire trial or the sentencing phase (Franz v. State, 296 Ark. 181, 196-197, Glaze, J. dissenting). The Arkansas Supreme Court reached its conclusion that mandatory appeal was not a constitutional requirement by relying upon Gilmore v. Utah, 429 U.S. 1012 (1976), although it recognized that Gilmore was, at least, in partial conflict with Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt V. Florida, 428 U.S. 242 (1976); and Jurek v. Texas, 428 U.S. 262 (1976):

> The idea that in Gregg, Proffitt, and Jurek, the United States Supreme Court has held that there must be a mandatory or automatic appeal from the imposition of the death penalty by a state trial court seems to have crumbled with the recent actions of the court in Gilmore. . .
>
> Franz, 296 Ark. at 187 quoting from Collins v. State, 261 Ark. 195, cert. den'd 434 U.S. 878 (1977)

The Arkansas Supreme Court did not address the implicit, and equally important, question of whether its arguable interpretation of the holding of Gilmore in 1976 now reflects "the evolving standards of decency that mark the progress of a

maturing society" in 1989. Gregg v. Georgia, 428 U.S. 153, 173 (1976) quoting Trop v. Dulles, 356 U.S. 86, 101 (1958). In this regard, it is of interest to note that Utah amended its laws within two years of the execution of Gary Gilmore to require mandatory appellate review in capital cases.

In its interpretation of Gilmore, the Arkansas Supreme Court has incorrectly assumed that this Court's failure to reach the underlying questions, because of the lack of standing of the petitioner, amounted to a rejection of principles which have, in fact, continued to maintain their vitality. Had the Arkansas Supreme Court more closely reviewed those cases, it would have found compelling precedent for the constitutional requirement of mandatory appeal. Among those holdings:

> [A]s an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice. . . .
>
> Gregg v. Georgia, 428 U.S. 153, 198 (1976)

> [o]ur decision in this case [upholding the Georgia death penalty statutes] depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality.
>
> Zant v. Stephens, 462 U.S. 862, 889 (1983)

Similar, but stronger, language appears in the concurring opinion to Pulley v. Harris, 465 U.S. 37 (1984):

> I believe the case law does establish that appellate review plays an essential role in eliminating the systematic arbitrariness and capriciousness which infected death penalty schemes invalidated by Furman [cite omitted], and hence that some form of meaningful appellate review is constitutionally required. . . in each of the statutory schemes approved in our prior cases, as in the scheme we review today, meaningful appellate review is an indispensable component of the Court's determination that the State's capital sentencing procedure is valid.
>
> Concurring opinion of Mr. Justice Stevens, Id. at 55-59

The question presented to this Court which compels the granting of this writ to determine the constitutional requirement of mandatory appellate review, cannot be better expressed than it is in the Opinion of the District Court issued in Simmons I:

> . . . .when we speak of the requirement that executions not take place until a death sentence has been reviewed we are not talking about a "right" that is personal to Mr. Simmons. It is, rather, the embodiment of societal values against cruel and unusual punishment. If a state court sentenced a defendant to be boiled in oil, and the defendant, for whatever reason, declined to object, would a horrified nation be forced to stand by while the sentence was carried out? If a defendant is innocent, may the state be allowed to convict and execute him because he wishes to be executed?
>
> Franz v. Lockhart, 700 F.Supp. 1005, 1023 (E.D. Ark. 1988)

B. STANDING OF THIRD PARTY

If, arguendo, the Arkansas death penalty statutes are constitutionally defective because of the absence of a mandatory appellate review provision, this Court should grant certiorari to address the question of whether, as a matter of important public policy, the strict requirements of standing should be relaxed, altered, or even disregarded when that constitutional defect could result in the execution of an innocent, or illegally convicted, defendant.

This Court has, in past cases, recognized that although its Article III powers do not allow it to consider "generalized grievances about the conduct of government", Flast v. Cohen, 392 U.S. 83, 106 (1968), the strict requirement of standing is, in some applications, only a "rule of practice" and that

exceptions may exist "where there are weighty countervailing policies", United States v. Raines, 362 U.S. 17, 22 (1960) citing Barrows v. Jackson, 346 U.S. 249 (1953) and N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958).

Such weighty policy considerations have often been found to exist in the area of First Amendment rights: Eisenstadt v. Baird, 405 U.S. 438 (1972) ("one who acted to protect the rights of a minority and the minority itself" Id. at 445); Dombrowski v. Pfister, 380 U.S. 479 (1965) ("we have fashioned this exception to the usual rules governing standing" [cite omitted] because of the ". . .danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application". [cite omitted]. Id. at 486-487.

In the area of civil litigation, the issue of standing has lead to the evolution of the "zone of interest" test, Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970) which was expansively applied in United States v. SCRAP, 412 U.S. 669 (1973) to give standing to an ad hoc group of law students to challenge a railroad rate increase that could have diverted natural resources out of the area and caused "economic, recreational and aesthetic harm". Id. at 675-76.

Does the potential public harm from the unreviewed imposition of the death penalty rise to the level which would justify a departure from the strictest requirements of standing? Justice Hickman of the Arkansas Supreme Court provides some guidance in this inquiry; for the period since Arkansas reinstated the death penalty, he has kept a record of all capital cases tried in Arkansas which he periodically adds as separate opinions to cases decided. Using his data for cases since 1983 through February 1989: during that period of time, the Arkansas Supreme Court reviewed 19 cases where the death penalty was imposed and affirmed in 11 (57.8%). Fretwell v. State, 289 Ark. 91, 99 (1986) (Hickman, J., concurring) and

Robertson v. State, 298 Ark. 131, 137 (1989) (Hickman, J., concurring). Thus, over 40% of those receiving the death penalty during this period of time had their convictions or sentences reversed on the first appellate review of the trial proceedings.

Petitioner Whitmore was sentenced to death for the death of one person during the commission of a robbery and is currently seeking post-conviction relief in state court. Since the Arkansas Supreme Court has committed to a rule of comparative review (". . .we must compare the wicked, inhumanity, and heinousness of this capital case with other capital cases." Whitmore v. State, 296 Ark. 308, 316 (1988)), the Petitioner Whitmore and all present and future individuals sentenced to death in Arkansas, are prejudiced by the failure of the Arkansas Supreme Court to provide for mandatory review so that crimes such as Simmons' may be included within the data base.

Gilmore v. Utah, supra, was decided in 1976 when no person had been executed since the decision in Furman v. Georgia, 408 U.S. 238 (1972). Since Gilmore's execution on January 17, 1977, over 100 persons have now been executed, and the numbers will apparently increase geometrically; Petitioner respectfully urges this Court to grant certiorari to determine whether a civilized society, living under the rule of law, can assure its citizens that none among them will be deprived of life without due process of law, while it shields its eyes from such violations behind the screen of "standing".

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to determine whether the Eighth Amendment's ban against cruel and unusual punishment requires mandatory appellate review in death penalty cases and whether that right may be asserted by a third party.

Respectfully submitted,

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Pro Bono Publico

Rev. Louis J. FRANZ, Individually and as Next Friend of Ronald Gene Simmons *v.* STATE of Arkansas

CR 88-76

Supreme Court of Arkansas
Opinion delivered July 11, 1988

1. COURTS — STANDING — NEXT-FRIEND STANDING — TWO REQUIREMENTS. — The petitioner must first meet the threshold requirement of showing he is a next friend; if that showing is made, petitioner must also demonstrate that a next-friend suit is maintainable because the person on whose behalf he acts is incompetent.
2. PARTIES — INSUFFICIENT RELATIONSHIP SHOWN FOR NEXT-FRIEND STATUS. — Where petitioner was a catholic priest who counsels inmates at the Arkansas Department of Correction, but nothing indicates he is the defendant's minister, spiritual adviser, or confidant, or even less, that the two have ever met, petitioner failed to allege any facts to show that his relationship to the defendant is sufficiently close to give rise to next-friend status.
3. TAXATION — TAXPAYER SUIT MUST BE COMMENCED IN A TRIAL COURT. — A taxpayer suit under article 16, section 13 of the Arkansas Constitution to prevent an illegal exaction must be commenced in a trial court; such a suit cannot be commenced in the appellate court.
4. TAXATION — TAXPAYER-SUIT PROVISION NOT SO BROAD THAT IT GIVES ONE TAXPAYER THE RIGHT TO INTERVENE IN THE MERITS OF A CRIMINAL CASE AGAINST ANOTHER PERSON. — The constitutional provision for a taxpayer suit is not so broad that it gives one taxpayer the right to intervene in the merits of a criminal case against another person.
5. COURTS — STANDING — IMPORTANT LEGAL ISSUES UNRESOLVED — INSUFFICIENT TO GRANT STANDING. — The existence of important legal issues which remain unresolved at the appellate level was insufficient reason to grant petitioner standing to challenge the defendant's death penalty.
6. APPEAL & ERROR — NO MANDATORY APPELLATE REVIEW IN DEATH PENALTY CASES. — There is no mandatory appellate review in Arkansas for death penalty cases.
7. CONSTITUTIONAL LAW — LACK OF MANDATORY REVIEW DOES NOT RENDER LAW UNCONSTITUTIONAL. — The lack of mandatory review in death penalty cases does not render Arkansas' death penalty unconstitutional.
8. CRIMINAL PROCEDURE — APPEAL NOT MANDATED IN DEATH

PENALTY CASES. — The provisions of Ark. Code Ann. § 16-91-113(a) (1987), Ark. R. Crim. P. 36.24, and Ark. R. Sup. Ct. 11(f) simply mean that the Arkansas Supreme Court must make its own examination of the record when an appeal is taken in such cases; they do not mandate an appeal.

9. CRIMINAL PROCEDURE — DEATH PENALTY — WHEN WAIVER OF RIGHT TO APPEAL PERMITTED. — In Arkansas, a defendant sentenced to death will be able to forego a state appeal only if he has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence.

10. CRIMINAL PROCEDURE — DEATH PENALTY — MANDATORY REVIEW OF COMPETENCY HEARING. — When a lower court has made a determination that a capital defendant can make a knowing and intelligent waiver of appeal, and has done so, the State has the burden of bringing the record of the lower court proceeding on this issue to the Arkansas Supreme Court for review.

11. APPEAL & ERROR — WHEN RECORD SHOULD BE LODGED ON MANDATORY REVIEW OF COMPETENCY TO WAIVE RIGHT TO APPEAL IN DEATH CASE. — The record of the determination of competency to waive right to appeal should, if possible, be lodged in the Arkansas Supreme Court after the time for appeal has lapsed, but, in any event, it must be lodged at least seven days before the execution date.

12. APPEAL & ERROR — REVIEW OF SUPREME COURT — MANDATORY REVIEW OF DETERMINATION OF COMPETENCY TO WAIVE RIGHT TO APPEAL IN DEATH CASE. — The Supreme court will review the proceeding to determine whether the defendant had the capacity to understand the choice between life and death and to knowingly and intelligently waive his rights to appeal his sentence of death; the standard of review, as in other types of criminal cases, is whether the trial judge's conclusion is clearly erroneous.

13. CRIMINAL PROCEDURE — NO ERROR IN FINDING DEFENDANT COMPETENT TO WAIVE RIGHT TO APPEAL DEATH SENTENCE. — Where the defendant's attorneys stated the defendant was "sane, rational, responsible and able to make his own decisions"; a highly qualified defense psychiatrist unequivocally stated that the defendant understood the consequences of his choice, was capable of making a rational decision, and was doing so freely and voluntarily; a State Hospital psychiatrist, after a 60-day evaluation before the trial and a second hour-and-a-half exam after the trial, testified the defendant understood the consequences of his choice and had made his choice knowingly, the trial court did not err in finding the defendant competent to waive his right to appeal; and where, a

month later at a second post-trial competency hearing, no other member of the State Hospital evaluation team testified, and neither the defense psychiatrist nor the defense attorneys retracted in any manner their statements that the defendant was competent to waive his right to appeal, even though the State Hospital psychiatrist "doubted" his original opinion because one sentence in a full page letter the defendant had written "hinted" at psychosis, the appellate court affirmed the trial court's ruling that the defendant was competent to waive his unqualified right to appeal.

Petition to Intervene as Next Friend; denied.

Mark S. Cambiano, for appellant.

Steve Clark, Att'y Gen., by: *Jack Gillean*, Asst. Att'y Gen., for appellee.

John Harris and *Robert E. Irwin*, for Ronald Gene Simmons.

ROBERT H. DUDLEY, Justice. On May 16, 1988, Ronald Gene Simmons was convicted of capital murder and sentenced to death in the Circuit Court of Franklin County. Immediately after being sentenced, Simmons took the stand and made a statement that included the following: "I, Ronald Gene Simmons, Sr., want it to be known that it is my wish and my desire that absolutely no action by anybody be taken to appeal or in any way change this sentence. It is further respectfully requested that this sentence be carried out expeditiously." Even after the trial court set a date for execution, Simmons refused to exercise his unqualified right of appeal. The trial court subsequently conducted a hearing and found that Simmons was competent to waive his right to an appeal and that his decision on the waiver was knowingly and intelligently made. As the date for execution neared, Rev. Louis J. Franz petitioned this court to allow him to proceed in this Court on Simmons' behalf as next friend, asked for a stay of execution, and asked that we make appeal mandatory in death cases. We granted a stay of execution and asked the parties and the petitioner to file briefs on (1) whether the petitioner has standing; (2) whether this Court should change its rules to require mandatory review of death cases; (3) if there is no rule change to require mandatory review of death cases, whether a decision to waive appeal in a death case should be reviewed by this Court; and (4) if appeal may be waived, whether the defendant in this case

understood the choice of life or death and knowingly and intelligently made that choice. Briefs have been received and oral arguments have been heard on the issues.

1. Standing of Rev. Franz

[1] The requirements of next friend standing are twofold. *See, e.g., Davis* v. *Austin*, 492 F. Supp. 273 (N.D. Ga. 1980). The *Davis* court noted, "The petitioners must first meet the threshold requirement of showing they are 'next friends.' If that showing is made, petitioners must also demonstrate that a 'next friend' suit is maintainable because the person on whose behalf they act is incompetent." *Id.* at 275.

As to the first requirement, the qualification as a next friend, the *Davis* court noted:

> The case law does not establish an easily applied test as concerning the requirements for standing as "next friend." The cases establish that such actions may be appropriate in cases of infancy, lack of time, and incompetency. *United States* v. *Preiser*, 506 F.2d 1115, 1126 n.8 (2d Cir. 1974). Although the relationship and interest of the proposed "next friend" is to be considered by the court before it entertains such an action, the cases do not adequately define who might act as next friend. *See Weber* v. *Garza*, 570 F.2d 511 (5th Cir. 1978). The court must start with the proposition that members of the public in general do not have a right to intercede as "next friend" in an action such as this because they are morally or philosophically opposed to the death penalty. On the other end of the scale, close relatives, such as a parent, spouse, or sibling, who maintain a close personal relationship with the aggrieved, would be appropriate persons to maintain a "next friend" action.

Davis, 492 F. Supp. at 275.

The facts of the *Davis* case are similar to the facts in this case. One of the persons seeking "next friend" status in *Davis* was the Rev. Murphy Davis. The court noted:

> The testimony shows that Reverend Davis is an ordained Presbyterian minister and Director of the Southern Prison Ministry of Georgia. She is philosophically opposed to

> capital punishment. Reverend Davis has had some personal contact with [the defendant] over approximately one and a half years and has counseled with him on occasion. The evidence does not demonstrate that she is in any way his personal minister or religious adviser.

Id. The court held, "Although the court has no doubt as to the deep sincerity of Reverend Davis' convictions, her connection with [the defendant] is that of a concerned minister who has made herself available to assist him. Such a relationship is insufficient to confer upon her status as 'next friend.' " *Id.* at 275-76. The court then went on to quote Justice Rehnquist's concern expressed in an opinion written in the capacity of Circuit Justice: "[H]owever worthy and high minded the motives of 'next friends' may be, they inevitably run the risk of making the actual defendant a pawn to be manipulated on a chessboard larger than his own case." *Lenhard* v. *Wolff*, 443 U.S. 1306, 1312, *stay of execution denied*, 444 U.S. 807 (1979), *quoted in Davis*, 492 F. Supp. at 276.

[2] Rev. Franz's connection to Simmons is even more tenuous than the one in *Davis*. According to his petition, Rev. Franz is a Catholic priest who counsels inmates at the Arkansas Department of Correction. There is nothing in his petition to indicate that he is Simmons' minister, spiritual adviser, or confidant, or even less, that the two have ever met. We hold that Rev. Franz has failed to allege any facts to show that his relationship to Simmons is sufficiently close to give rise to next friend status, and we therefore cannot grant him standing on this basis.

[3, 4] Rev. Franz alternatively argues that even if he does not have standing as next friend, he has standing as a taxpayer under article 16, section 13 of the Constitution of Arkansas, the illegal exaction provision. The argument is without merit for at least two reasons. First, a suit to prevent an illegal exaction must be commenced in a trial court. Such a suit cannot be commenced in this appellate court. Second, the constitutional provision is not so broad that it gives one taxpayer the right to intervene in the merits of a criminal case against another person.

[5] Rev. Franz's last alternative argument is that if he is not granted standing in this case then important legal issues will

go unresolved at the appellate level. Even though this is true, it is not sufficient to give petitioner standing. In *Gilmore* v. *Utah*, 429 U.S. 1012 (1976), the Supreme Court of the United States terminated Gary Gilmore's stay of execution at his request. At the time, the constitutionality of the Utah death penalty statute had not been reviewed by either the Utah Supreme Court or the Supreme Court of the United States. Justice White noted in his dissent (which was joined by Justices Brennan and Marshall) that "there are substantial questions under *Furman* v. *Georgia*, 408 U.S. 238 (1972), about the constitutionality of the Utah death penalty statute. Because of Gary Gilmore's purported waiver of his right to challenge the statute, none of these questions was resolved in the Utah courts." *Gilmore*, 429 U.S. at 1017-18 (White, J., dissenting). Justice Blackmun also noted that the constitutional question was "not insubstantial." *Id.* at 1020 (Blackmun, J., dissenting). Chief Justice Burger (joined by Justice Powell) was unconcerned, noting, "Gilmore has not challenged the validity of the statute under which he was convicted, and there is no other party before this Court with requisite standing to do so." *Id.* at 1017 n.7 (Burger, C.J., concurring). The existence of the question was not sufficient to give a third person standing, and, therefore, the question went unresolved at the appellate level. Accordingly, we reject Rev. Franz's attempt to gain standing simply because of the existence of important legal issues which remain unresolved at the appellate level.

2. Mandatory Review

However, as has often been noted, "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice." *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976). Because of the punishment's uniqueness and irreversibility, we choose to state clearly the law in Arkansas regarding the waiver of appeal in death cases.

[6] The threshold question is whether an appeal is mandatory in cases involving a death sentence. We have said that it is not: "[T]here is no mandatory appellate review in Arkansas." *Collins* v. *State*, 261 Ark. 195, 211, 548 S.W.2d 106, 115, *cert. denied*, 434 U.S. 878 (1977).

[7] The next question is whether the lack of mandatory

appeal renders our law unconstitutional. We have held that it does not:

> It is urged, however, that our system does not meet *Gregg-Proffit-Jurek* standards necessary to avoid Eighth and Fourteenth Amendment prohibitions for lack of a mandatory appeal of a judgment imposing the death penalty and of appellate review which compares cases in which the death penalty has been imposed. [This is a reference to the standards set out in *Gregg* v. *Georgia*, 428 U.S. 153 (1976), *Proffitt* v. *Florida*, 428 U.S. 242 (1976), and *Jurek* v. *Texas*, 428 U.S. 262 (1976).]
>
> We find nothing in any opinion, and certainly no majority, which supports a holding that there *must* be either a mandatory or automatic appeal of a judgment imposing the death penalty or that there *must* be appellate review which compares cases in which the death penalty has been imposed. . . .
>
> . . . It seems to us that the only actual requirement, even of the Stewart plurality, is that a *meaningful* appellate review is available to insure that death penalties are not arbitrarily, capriciously or freakishly imposed. The important question is whether the system creates a substantial risk of arbitrariness or caprice.
>
> . . . .
>
> The idea that in *Gregg*, *Proffit*, and *Jurek*, the United States Supreme Court has held that there must be a mandatory or automatic appeal from the imposition of the death penalty by a state trial court seems to have crumbled with the recent actions of the court in *Gilmore* v. *State of Utah*, 429 U.S. 1012, 97 S. Ct. 436, 50 L. Ed. 2d 632 (1976) . . . . If the Constitution of the United States requires that a state provide a mandatory appeal in such cases, we do not see how there can be a knowing and intelligent waiver of "any and all federal rights" [as was found in *Gilmore*] when there has been no appeal from the state trial court's judgment imposing the death sentence. [Gilmore, too, had waived his right of appeal under state law.]

Collins, 261 Ark. at 204-06, 548 S.W.2d at 111-12.

[8] To support his contention that appeals in death penalty cases are mandatory, the petitioner cites Ark. Code Ann. § 16-91-113(a) (1987) and Ark. R. Crim. P. 36.24. The statute provides, "The Supreme Court need only review those matters briefed and argued by the appellant, except that, where either a sentence for life imprisonment or death has been imposed, the Supreme Court shall review all errors prejudicial to the rights of the appellant." Rule 36.24 contains almost identical language. These provisions, along with Ark. R. Sup. Ct. 11(f), simply mean that this Court must make its own examination of the record when an appeal is taken in such cases; they do not mandate an appeal.

3. Waiver

We note, however, that when a defendant sentenced to death declines to exercise his unqualified right to appeal, we will not automatically acquiesce to his desire.

In *Collins*, we noted that "[t]he likelihood that a death penalty would be executed without such an appeal, in the absence of a knowing and intelligent waiver, is highly improbable." *Id.* at 211, 548 S.W.2d at 115. This language recently served as the basis for our decision in *Rameta* v. *State*, 294 Ark. 206, 740 S.W.2d 928 (1987) (per curiam). In *Rameta*, the defendant had been sentenced to death and wished to be executed. He petitioned us to dismiss his appeal. Relying on *Collins*, we held that such a defendant will not be allowed to forego an appeal unless the trial court, in its discretion, has determined that the defendant's decision has been knowingly and intelligently made. However, we left two questions unanswered in *Rameta*.

[9] The first question involves what standard is to be used by a trial court in determining whether a decision to waive appeal is knowing and intelligent. The federal standard seems to be "roughly equivalent to the standard used to determine competency to stand trial: the defendant will be competent unless he lacks sufficient 'capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation.'" White, *Defendants Who Elect Execution*, 48 U. Pitt. L. Rev. 853, 863 (1987) (quoting *Rees* v. *Peyton*, 384 U.S. 312, 314 (1966) (per curiam)). This standard has been widely

criticized. *See, e.g.*, Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. Crim. L. & Criminology 860 (1983); White, *supra*. We feel that Professor Welsh White correctly summarized the problem with the standard:

> The issue of competency is troubling. The present standard for competency to elect execution is roughly equivalent to the test for competency to stand trial. But the decisions involved in the two situations are entirely different. When competency to stand trial is at issue, the court is required to determine whether the defendant understands the charges against him and has the capacity to communicate effectively with his attorney. When competency to elect execution is involved, the issue is whether the defendant has the capacity to choose between life and death. The focus should be upon not only the defendant's ability to understand the basic issue but also upon his ability to resolve it knowingly and voluntarily. Defense attorneys who specialize in capital cases claim that many capital defendants who have an adequate understanding of the charges against them and are fully competent to communicate with counsel should nevertheless be barred from electing execution because they lack either the judgment or the emotional stability to make a firm and stable decision, much less an informed one.

White, *supra*, at 867 (footnotes omitted). We adopt this higher criterion for declining to exercise the right to appeal in a capital case. Therefore, in Arkansas, a defendant sentenced to death will be able to forego a state appeal only if he has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence.

[10-12] The second question unanswered by *Rameta* is whether this Court must review a lower court's determination on the issue of the waiver of an appeal in a capital case. We hold that we must. In future cases, when a lower court has made a determination that a capital defendant can make a knowing and intelligent waiver of appeal, and has done so, the State has the burden of bringing the record of the lower court proceeding on

this issue to this Court for review. The record on this issue should, if possible, be lodged in this Court after the time for appeal has lapsed, but, in any event, it must be lodged at least seven days before the execution date. We will then review the proceeding to determine whether the defendant had the capacity to understand the choice between life and death and to knowingly and intelligently waive his rights to appeal his sentence of death. The standard of review, as in other types of criminal cases, is whether the trial judge's conclusion is clearly erroneous. *See Rector* v. *State*, 277 Ark. 17, 638 S.W.2d 672 (1982).

In this case the trial judge found that the defendant made a rational choice and knowingly and intelligently waived his right to an appeal. That finding is not clearly erroneous.

Not only has the defendant failed to exercise his unqualified right to appeal, but, in addition, after being sentenced, affirmatively stated:

> [I]t is my wish and my desire that absolutely no action by anybody be taken to appeal or in any way change this sentence.
>
> It is further respectfully requested that this sentence be carried out expeditiously. I want no action that will delay, deny, defer or denounce this very correct and proper death sentence.
>
> My attorneys have repeatedly counseled me to appeal. However, that is not what I want. I believe now, and always have, in the death penalty. To those who oppose the death penalty, I say in my particular case anything short of death would be cruel and unusual punishment.
>
> I am of sound mind and body and have been seen by psychoanalysts, who can verify that I am capable of making a clear and rational decision. I have given clear and careful thought and consideration so there is nothing that will cause me to change my mind. I only ask for what I deserve. Let the torture and suffering end. Please allow me the right to be at peace.

At the same time his attorneys gave an affidavit in which they said he is "sane, rational, responsible and able to make his

own decisions."

At a subsequent hearing on his competency to waive appeal, Dr. Lew Neal, a highly qualified psychiatrist hired by the defense attorneys, testified and gave an affidavit which together unequivocally state that Simmons understands the consequences of his choice, is capable of making a rational decision, and is doing so freely and voluntarily.

Dr. Irving Kuo, a psychiatrist with the State Hospital, which is an agency independent of the prosecutor, see *Parker* v. *State*, 292 Ark. 421, 433, 731 S.W.2d 756, 762 (1987), examined Simmons during a sixty day evaluation before the trial and examined him for an hour and a half after the trial. He testified that Simmons understands the consequences of his choice and has made his choice knowingly. The key questions by the trial court and the decisive answers by Dr. Kuo are as follows:

> Q. Of course, the conclusion that the Court has to reach today is not necessarily whether the Defendant appreciated the criminality of his conduct or that he was able to assist his attorneys. What I am required to do now is make a decision as to whether he can knowingly and intelligently waive his right to appeal his conviction. Do you have an opinion along those lines?
>
> A. Yes, I do.
>
> Q. Have you discussed this with Mr. Simmons?
>
> A. Yes, I have.
>
> Q. Do you feel that he is capable of making a decision that is knowingly and intelligently arrived at?
>
> A. Yes, I do.
>
> Q. What is the basis of your opinion?
>
> A. Okay. During the hour and a half that I spoke with him I tried to retrace a little bit of history since the last time I saw him; and basically I conducted an interview for about ninety minutes and touched on a number of topics, including one about the sentencing and his desire to waive the—
>
> Q. The appeal process?

A. —waive the appeal process; and in the course of that, I tried to get a feel of how he was today. I did what we call a mental status examination, which basically is a snapshot of—which basically is a snapshot of his psychiatric or mental condition right at the time that I interviewed him. My assessment was that he looked very much like he did during the two months that I had seen him earlier this year. There was no evidence of any psychotic process. His thinking was goal-directed, was relevant, logical. He seemed able to make an intelligent decision that was not interfered by—that didn't have any interference by any kind of psychiatric problem that I could detect.

Q. Do you feel that Mr. Simmons is under any pressure or anything that's causing him to take this position?

A. Well, I think that Mr. Simmons has some internal pressure in terms of wanting to waive the particular appeal process. I don't think there is any external pressure from any outside source. I think that in spite of the conviction he comes across as an extremely moralistic very rigid gentleman who has some real rigid ideas about right and wrong and his own statement was that the punishment needs to fit the crime and he felt that this was, you know, an appropriate and proper decision, the one that came down on Thursday; and he seemed to think that it was quite proper. He seemed to indicate that he knew what he did. He indicated that it was in a somewhat premeditated fashion and that he felt that the punishment should fit the crime. He told me that he does believe in capital punishment.

At the conclusion of this hearing the trial court found that Simmons was competent to waive his right to an appeal.

One month later a competency hearing was held at the request of the petitioner, Rev. Franz. At that hearing the state hospital psychiatrist, Dr. Kuo, modified his opinion.

Dr. Kuo stated that his modified opinion came about as follows: He wrote to the defendant and said he would like to have another interview in order to obtain information for publication in a professional journal. The defendant responded and in the first

sentence of the fifth paragraph wrote: "Evidence is beginning to surface to indicate that officials are starting to play their little games." Dr. Kuo testified that one sentence "can hint towards" psychosis and therefore he had "some doubt as to whether that opinion [his original opinion] was correct." At another time he said he had a "doubt," not just "some doubt," about his original opinion.

Dr. Kuo testified that his original opinion was given after sixty days of personal observation, not only by himself but by an evaluation team. He admitted that he had not talked to the defendant since his first opinion and admitted that no other member of the evaluation team was present to testify as to any doubt. Significantly, the petitioner did not attempt to call the defendant's own psychiatrist.

Simmons took the stand and testified that he did not want Rev. Franz or anyone else to serve as his next friend.

The trial court again found Simmons competent to waive his right to appeal. The ruling is not clearly erroneous.

The trial court was in a position to observe the testimony of Dr. Kuo and the defendant. The Supreme Court of the United States has stated:

> In *United States* v. *Oregon Medical Society*, 343 U.S. 169 (1952), commenting on the deference which this Court gave to the findings of a District Court on direct appeal from a judgment in a bench trial, we stated:
>
> > "As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' *Boyd* v. *Boyd*, 252 N.Y. 422, 429, 169 N.E. 632, 634." *Id.*, at 339.

Marshall v. *Lonberger*, 434 U.S. 422, 434 (1983).

[13] Dr. Kuo did not retract his statement that the defendant was competent; he only stated that he had doubts about his original opinion. His original opinion was given based upon sixty days observation coupled with an hour and a half interview at the time of the first opinion. The doubt about that opinion was not created by a first-hand interview but by one sentence in a full-page letter. No other member of the evaluation team testified. Neither Dr. Neal, the defendant's psychiatrist, nor the defense attorneys have retracted in any manner their statements that Simmons is competent to waive his right to appeal. Accordingly, we affirm the trial court's ruling that the defendant is competent to waive his unqualified right to appeal.

We hold that Rev. Franz does not have standing and that the defendant understands the choice of life and death and has made a knowing and intelligent waiver of his right to appeal. Accordingly, the stay of execution which we granted on June 20, 1988, is hereby terminated. Since Rev. Franz does not have standing, he does not have standing to file a petition for rehearing. Therefore, the mandate is ordered to be issued at the time this opinion is handed down.

HAYS, J., dissents.

GLAZE, J., concurs in part and dissents in part.

TOM GLAZE, Justice, concurring in part and dissenting in part. I agree with the majority that Reverend Louis J. Franz has no standing to pursue an appeal on behalf of Ronald Gene Simmons. While this court is confronted for the first time with the standing and competency issues in a death penalty situation, those issues have been considered and decided in numerous cases in other jurisdictions. *See Smith, Mo. Public Defendant Comm'n* v. *Armontrout*, 812 F.2d 1050 (8th Cir. 1987); *Lovelace* v. *Lynaugh*, 809 F.2d 1136 (5th Cir. 1987); *Rumbaugh* v. *McKaskle*, 730 F.2d 291 (5th Cir. 1984); *Hays* v. *Murphy*, 663 F.2d 1004 (10th Cir. 1981); *Davis* v. *Austin*, 492 F. Supp. 273 (N.D. Ga. 1980); *State* v. *Hightower*, 214 N.J. Super 43, 518 A.2d 482 (1986); and *State* v. *Bailey*, 519 A.2d 132 (Del. Super. Ct. 1986). All of the foregoing decisions cite *Gilmore* v. *Utah*, 429 U.S. 1012 (1976), and in relying on *Gilmore*, those courts have either

generally, or specifically, adhered to the proposition that a defendant who has been sentenced to death can make a competent, knowing and intelligent choice to abandon further litigation, and when that choice is made, it will be honored by the courts. In each of the cases set out above, the court, quoting from *Rees* v. *Peyton*, 384 U.S. 312 (1966), posed the critical issue as follows: "Whether the defendant has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." If the defendant is determined to be competent, then a next friend has no standing to pursue further proceedings when the defendant chooses not to proceed.

In the present case, the trial judge held hearings to determine Simmons's competency, and after analyzing considerable evidence and testimony, the judge found Simmons had the capacity to waive his right to an appeal. It is this court's duty to review the lower court's findings under the clearly erroneous standard. *Cf. Smith, Mo. Public Defendant Comm'n*, 812 F.2d at 1058. The majority opinion details much of the testimony taken during the hearings bearing on the competency issue, and I thoroughly agree with the finding that the trial judge's decision is not clearly erroneous.

In reaching its decision, the majority concludes that this court must review a lower court's determination on the issue of the waiver of an appeal in a capital case. While the court gives no basis for its holding, I have no doubt that such a decision is required by the Supreme Court's holding in *Gilmore*. It is really unimportant why the majority has decided that an appellate review is necessary in order to examine the waiver issue in capital cases, but once the majority did so, I believe it should have expanded such a review to include the sentencing stage of a defendant's trial. My reasons for suggesting such a review are several.

First, the Supreme Court has not yet decided the issue as to whether a defendant has the power to waive the right to a state appellate review. *Gilmore*, 429 U.S. at 1017 (Burger, C.J., concurring). Instead, the Supreme Court in *Gilmore* merely

reviewed the record bearing on Gilmore's competency and decided his mother did not have standing to speak for him. I believe the Supreme Court's holding implicitly requires that an appellate review be given in such competency matters. However, little more can be gleaned from the *Gilmore* decision. As a consequence, the Supreme Court—as well as this court—must still decide whether appellate reviews are mandated in capital cases. This court in *Collins* v. *State*, 261 Ark. 195, 548 S.W.2d 106 (1977), discussed this very issue and by a four-to-three vote, the majority concluded that a mandatory or automatic appeal of a judgment imposing the death penalty is not required. Justice George Rose Smith wrote a persuasive dissenting opinion asserting that a mandatory review should be provided. Nothing more on the subject has been done by either this court or the General Assembly, and the Supreme Court has not reached or conclusively decided whether such appeals are mandated by the Constitution.

In addition to the fact that a substantial constitutional question still remains unresolved concerning the question of mandatory review, Arkansas, and perhaps Ohio, are the only states that have no specific provisions for an automatic review of capital cases. *See* U.S. Dept. of Justice, Bureau of Justice Statistics, Bull., *Capital Punishment, 1986* (Sept. 1987).[1] Although Ohio has been noted as a state that does not provide for an automatic review, the case of *State* v. *Brooks*, 25 Ohio St. 3d 144, 495 N.E.2d 407 (1986), lends some argument to the contrary. While such issue was not specifically addressed in *Brooks*, it is important to note that Brooks's motion to withdraw his appeal of the death sentence was denied by the Ohio appellate court even though the record reflected Brooks was competent to stand trial.[2] After denying Brooks's motion, the Ohio Court of Appeals, and later the Ohio Supreme Court, reviewed Brooks's death sentence in detail, concluding that the sentence was proper. In sum, out of the thirty-seven states that provide for the death penalty, thirty-

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[1] This Bulletin recites Arkansas, Florida, Ohio and Vermont have no such provisions but both Florida and Vermont have since amended their laws to provide mandatory reviews.

[2] Apparently the Ohio courts never required a hearing (or found one was necessary) to determine whether Brooks was competent to waive his right of appeal.

SUPREME COURT OF ARKANSAS

No. CR89-45

MAR 10 1989

RONALD GENE SIMMONS, PETITIONER, V. STATE OF ARKANSAS, RESPONDENT.	PETITION REQUESTING EXPEDITED REVIEW OF WAIVER OF DIRECT APPEAL IN A CAPITAL MURDER CASE IN WHICH THE DEATH PENALTY WAS IMPOSED PETITION GRANTED

Per Curiam

The petitioner, Ronald Gene Simmons, has filed his petition requesting expedited review of his waiver of direct appeal. On February 10, 1989, a Johnson County jury convicted the petitioner of capital murder and sentenced him to death by lethal injection, on March 16, 1989, at 7:00 o'clock a.m. Following the trial, the petitioner notified the trial judge of his desire to waive his appeal and after an evidentiary hearing held on March 1, 1989, the trial judge found the petitioner was competent to waive his right to a direct appeal. In accordance with this court's decision in Franz v. State, 296 Ark. 181, 754 S.W.2d 839 (1988), petitioner now submits to this court a transcript of the lower court's proceedings along with his petition, and requests we review those proceedings in accordance with the rule established in the Franz case. After careful review of those lower court proceedings, we grant petitioner's request.

In Franz, we held that when a defendant sentenced to death declines to exercise his unqualified right to appeal, we will not automatically acquiesce to his desire. We stated that a defendant sentenced to death will be able to forego an appeal only if he has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence. This court further held that we must review a lower

court's determination on the issue of the waiver of an appeal in a capital case, and that the state has the burden of bringing the lower court's record on this issue to this court for review. We added that the record must be lodged at least seven days before the execution date. All of these requirements have been met.

In sum, we would note that the trial court considered, and made a part of this proceeding, the same psychological evaluations that were introduced in Franz. Since those evaluations were alluded to in detail there, we need not reiterate those findings in this opinion. In addition, the trial court added to the record before us a forensic evaluation which was filed in a proceeding before the United States District Court, Eastern District of Arkansas. The federal court proceeding concerned the issue of whether Mr. Simmons was presently competent to waive habeas corpus relief. From our review of this recent forensic evaluation, we find nothing that diminishes in any way the earlier psychological evaluations submitted in the state proceedings.

The trial judge and petitioner's counsel performed an exceptional job in examining and exploring the petitioner's capacity to understand the choice between life and death and his ability to know and to intelligently waive any and all rights he might have in an appeal of his sentence. In addition, petitioner's counsel thoroughly discussed seven possible points that could be argued for reversal on appeal, and petitioner responded by stating he understood those points and that he rejected all encouragement and suggestions to appeal. Petitioner further acknowledged that the execution date was set for March 16, 1989, and that he had thirty days in which to appeal his conviction judgment.

After a careful review of the record and exhibits, we affirm the trial court's decision that the petitioner has

knowingly and intelligently waived his right to appeal. Accordingly, we direct that this court's mandate be issued at the time this opinion is handed down.

HAYS, J., dissents for the reasons stated in Franz v. State, 296 Ark. 181, 754 S.W.2d 839 (1988).

SUPREME COURT OF ARKANSAS

No. CR89-45

MAR 13 1989

RONALD GENE SIMMONS, PETITIONER, V. STATE OF ARKANSAS, RESPONDENT.	MOTION TO INTERVENE AND FOR STAY OF EXECUTION MOTION DENIED

Per Curiam

Petitioner has failed to show that he has standing to intervene in this cause. Franz v. State, 296 Ark. 181, 754 S.W.2d 839 (1988).

five of them require an automatic review. As pointed out, the Ohio courts, representative of one of the two states that have no automatic review requirement, have failed to address the issue directly, but instead opted to review a capital case even after the defendant (who was found competent to stand trial) sought to abandon his right of appeal. Thus, by the majority's opinion Arkansas becomes the only state that actually has chosen not to review a death penalty case.

Another reason for requiring reviews in death penalty situations is reflected in this state's present laws. Arkansas's laws clearly provide that great scrutiny be given death penalty cases before a defendant is executed. For example, in capital felony murder cases, a separate phase of the trial is required for sentencing, at which evidence relating to aggravating or mitigating circumstances may be presented to the same jury that found the defendant guilty of the crime. Ark. Code Ann. § 5-4-602 (1987). The jury is authorized to impose the death sentence only if it unanimously returns written findings that the aggravating circumstances exist beyond a reasonable doubt, that the aggravating circumstances outweigh all mitigating circumstances, and that the aggravating circumstances justify a sentence of death beyond a reasonable doubt. Ark. Code Ann. § 5-4-603 (1987). Also, this court has held that the review of capital cases with death sentences requires the court to consult prior cases as precedent in order to determine whether there was error in the sentencing procedure, whether the evidence was sufficient to support any finding made by the jury, whether any of the findings were the result of passion or prejudice or other arbitrary factors and whether there was an abuse of discretion of either the jury or the trial judge in imposing sentence. *Collins*, 261 Ark. at 221, 548 S.W.2d at 212. Furthermore, this court is mandated under A.R.Cr.P. Rule 36.24 and Ark. Sup. Ct. R. 11(f) to review the entire record for errors prejudicial to the right of the appellant. Obviously, without mandatory appellate review, none of the foregoing legal requirements can be measured when a defendant chooses to waive his right to appeal—which leads me to the final reason why I believe the appellate review of a defendant's sentence should be required.

In my view, no criminal defendant, including Simmons in this cause, should dictate this state's policy concerning whether

death sentences should be reviewed. The question posed in these cases in no way involves the constitutionality of the death penalty itself. The courts are, however, confronted with the various constitutional and statutory requirements needed to be complied with when imposing the death penalty.

In a number of cases cited earlier in this opinion, the criminal defendants often changed their minds during their trials or appeals as to whether they desired to abandon or continue their rights of appeal. Obviously, such changes in attitude can be expected, but those changes also lead to extensions and delays in the judicial process. This court can avoid such delays by taking charge of this state's appellate process and requiring that in every capital case where the death penalty has been imposed, the court will automatically review the lower court's record of the *sentencing phase* of the trial.

The majority has—as I believe *Gilmore* requires—provided for review of any competency hearing required when a defendant chooses to waive his or her right of appeal. In the present case, a little more than two months have transpired between Simmons's competency hearing and this court's final review of that hearing. In my estimation, no delay would have been added if this court had reviewed the sentencing stage of Simmons's trial. By adopting such a review procedure, the court would allow any defendant to waive his right of appeal concerning his guilt, but at the same time, the state's highest court would provide a prompt review concerning whether the death penalty was constitutionally and appropriately imposed. This would ensure the scrutiny of death penalty cases that our law mandates.

Because Arkansas's present procedure is, in my view, constitutionally suspect, this court could avoid those constitutional questions and potential pitfalls by reviewing the sentence phase of death penalty cases. Such a review would, at the same time, provide a more expeditious manner by which such capital cases may be disposed. Certainly, such a review procedure would place the process of review of capital cases in the control of the state's judiciary, as it should be, rather than at the impulse or whim of a defendant.

STEELE HAYS, Justice, dissenting. While I concur in the majority view that the Reverend Louis J. Franz lacks standing to

act as next friend for Ronald Gene Simmons, I would adopt a rule for mandatory appellate review and apply it to this case.

I concede there is no express provision in our law for mandatory appeal, but it is at least arguable that our law now implicitly provides for mandatory review by this court in cases in which a sentence of death is imposed. While dictum to the contrary appears in *Collins* v. *State*, 261 Ark. 195, 211, 548 S.W.2d 106 (1966), that was not the holding and certainly does not prevent our adopting a rule for mandatory review in death cases. Moreover, in *Collins* this court committed itself to a proportional review where death is imposed on the defendant. Our Rule 11(f), adopted pursuant to Act 333 of 1971, states that "when the sentence is death or life imprisonment, the court *must* review all errors prejudicial to the appellant." (My emphasis). Additionally, in *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980), we said that in a capital case if the trial court fails to instruct the jury that it has the option of returning a lesser penalty than death, that is reversible even in the absence of an objection. Keeping faith with *Wicks*, *Collins*, and Rule 11(f), mandates, I submit, appellate review of the entire record in death cases.

But whether the law now provides for mandatory appeal is beside the point, as it is plainly within the rule making power of this court to effectuate such a rule to operate immediately. If we can change our rule in a civil case to affect pending litigation, as we did in *Ford Motor Credit Co.* v. *Nesheim*, 287 Ark. 78, 696 S.W.2d 732 (1986),[1] we can certainly do so where the death sentence is involved.

The adoption of such a rule, as I envision it, simply means that, notwithstanding a waiver of appeal by the defendant, this court, on information from either the Attorney General or the trial court, that a death sentence has been imposed, would issue a writ of certiorari for the record and appoint counsel to argue any errors prejudicial to the defendant. The unique severity of the death sentence and the public interest in its imposition demand nothing less.

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[1] On March 18, 1985, we amended Rule 2(a)(9) of the Rules of Appellate Procedure to permit an appeal by *Ford Motor Credit Co.* from an order of the trial court certifying the case as a class action.

The public's interest and right to having a review of a death sentence is discussed in Kaine, *Capital Punishment and the Waiver of Sentence Review*, 18 Harv. C.R.-C.L. L. Rev. 483 (1983) (footnotes omitted):

> The societal interest in ensuring that capital punishment is fairly imposed is too great to allow execution without the appellate scrutiny required by the eighth amendment
>
> . . . .
>
> It is also inappropriate to grant complete power to a defendant's waiver when that choice will infringe upon the constitutional rights of other citizens. The [Supreme] Court recognized this limitation on waiver in *Richmond Newspapers* v. *Virginia*, by holding that the first amendment rights of reporters and others to be present at a criminal trial outweighed a defendant's waiver of a public trial. Similarly, an attempt to force execution by the state prior to the resolution of inquiries required by the Constitution violates that document's protection of the public from abuse of state power.
>
> Finally, statutory and judicial restrictions upon the ability of a capital defendant to decide whether to be present at trial or to pursue review of a sentence—decisions not generally based on specific constitutional protections—reflect the understanding that the death penalty is a matter of public as well as individual concern.

I do not question the right of a competent defendant to refrain from participating in an appeal, or to deny others the right to act in his behalf. But that right does not empower a defendant to by-pass appellate review any more than he could by-pass a trial or, if a plea of guilty is entered, a hearing on the guilty plea. These steps are basic, and where the sentence is death, appellate review is equally basic. By rejecting the opportunity to adopt a rule of mandatory review the majority has put Arkansas at odds with all but one of the thirty-seven states which have the death penalty, not an enviable position, and not one likely to endure.

5-4-601. Legislative intent.

(a) It is the intention of the General Assembly of the State of Arkansas, in enacting this subchapter, to specify the procedures and standards pursuant to which a sentencing body must conform in making a determination as to whether a sentence of death is to be imposed upon a conviction of capital murder.

(b) In the event that the provisions of this subchapter respecting sentencing procedures are held invalid with regard to the imposition of a sentence of death or a sentence of death is declared to be invalid per se, it is the intent of the General Assembly that:

(1) Capital murder shall be punishable by life imprisonment without parole; and

(2) The procedures and findings required by §§ 5-4-602 — 5-4-605, 5-4-607, and 5-4-608 shall be deemed repealed and of no effect.

History. Acts 1975, No. 280, § 1308; A.S.A. 1947, § 41-1308.

5-4-602. Capital murder charge — Trial procedure.

The following procedures shall govern trials of persons charged with capital murder:

(1) The jury shall first hear all evidence relevant to the charge or charges and shall then retire to reach a verdict of guilt or innocence.

(2) If the defendant is found not guilty of the capital offense charged but guilty of a lesser included offense, sentence shall be determined and imposed as provided by law.

(3) If the defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence as provided by subdivision (4) hereof, and to determine sentence in the manner provided by § 5-4-603; except that, if the state waives the death penalty, stipulates that no aggravating circumstance exists, or stipulates that mitigating circumstances outweigh aggravating circumstances, no such hearing shall be required, and the trial court shall sentence the defendant to life imprisonment without parole.

(4) In determining sentence, evidence may be presented to the jury as to any matters relating to aggravating circumstances enumerated in § 5-4-604 or any mitigating circumstances. Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters, but the admissibility of evidence relevant to the aggravating circumstances set forth in § 5-4-604 shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant or his counsel shall be permitted to present argument respecting sentencing.

History. Acts 1975, No. 280, § 1301; A.S.A. 1947, § 41-1301.

5-4-603. Findings required for death sentence — Unanimity.

(a) The jury shall impose a sentence of death if it unanimously returns written findings that:

(1) Aggravating circumstances exist beyond a reasonable doubt; and

(2) Aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and

(3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt.

(b) The jury shall impose a sentence of life imprisonment without parole if it finds that:

(1) Aggravating circumstances do not exist beyond a reasonable doubt; or

(2) Aggravating circumstances do not outweigh beyond a reasonable doubt all mitigating circumstances found to exist; or

(3) Aggravating circumstances do not justify a sentence of death beyond a reasonable doubt.

(c) If the jury does not make all findings required by subsection (a), the court shall impose a sentence of life imprisonment without parole.

(b) If the execution of the sentence of death as provided in subsection (a) is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be carried out by electrocution in a manner determined by the Director of the Department of Correction.

(c) Nothing in this section is to be construed as a declaration by the Arkansas General Assembly that death by electrocution constitutes cruel and unusual punishment in violation of the Constitutions of the United States or the State of Arkansas.

5-10-101. Capital murder.

(a) A person commits capital murder if:

(1) Acting alone or with one (1) or more other persons, he commits or attempts to commit rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree, and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life; or

(2) With the premeditated and deliberated purpose of causing the death of any law enforcement officer, jailer, prison official, firefighter, judge or other court official, probation officer, parole officer, or any military personnel, when such person is acting in line of duty, he causes the death of any person; or

(3) With the premeditated and deliberated purpose of causing the death of any person, he causes the death of two (2) or more persons in the course of the same criminal episode; or

(4) With the premeditated and deliberated purpose of causing the death of the holder of any public office filled by election or appointment or a candidate for public office, he causes the death of any person; or

(5) While under sentence of life imprisonment, life imprisonment without parole, or death, he purposely causes the death of another person after premeditation and deliberation; or

(6) Pursuant to an agreement that he cause the death of another person in return for anything of value, he causes the death of any person; or

(7) He enters into an agreement whereby one person is to cause the death of another person in return for anything of value, and the person hired, pursuant to the agreement, causes the death of any person.

(b) It is an affirmative defense to any prosecution under subsection (a)(1) of this section for an offense in which the defendant was not the only participant that the defendant did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid its commission.

(c) Capital murder is punishable by death or life imprisonment without parole pursuant to §§ 5-4-601 — 5-4-605 and 5-4-607 — 5-4-609. For all purposes other than disposition under §§ 5-4-101 — 5-4-104, 5-4-201 — 5-4-204, 5-4-301 — 5-4-308, 5-4-310 — 5-4-312, 5-4-401 — 5-4-404, 5-4-501 — 5-4-505, 5-4-601 — 5-4-605, and 5-4-607 — 5-4-609, capital murder is a Class Y felony.

RULE 36.1. Right of Appeal.

Any person convicted of a misdemeanor or a felony by virtue of trial in any circuit court of this state has the right to appeal to the Arkansas Court of Appeals or to the Supreme Court of Arkansas. An appeal may be taken jointly by co-defendants or by any defendant jointly charged and convicted with another defendant, and only one (1) appeal need be taken where a defendant has been found guilty of one (1) or more charges at a single trial. Except as provided by Rule 24.3(b) there shall be no appeal from a plea of guilty or nolo contendre [contendere]. [Amended by Per Curiam July 13, 1987, effective October 1, 1987.]

RULE 36.24. Matters to Be Considered on Appeal.

The Supreme Court need only review those matters briefed and argued by the appellant provided that where either a sentence for life imprisonment or death was imposed, the Supreme Court shall review the entire record for errors prejudicial to the right of the appellant.

RULE 36.25. Action to Be Taken on Appeal.

A conviction shall be reversed and a new trial ordered where the Supreme Court finds that the conviction is contrary to the Constitution, the laws of Arkansas or for any reason determines that the appellant did not have a fair trial. Where appropriate, the Supreme Court shall reverse the conviction and order the appellant discharged. In all other cases, the conviction must be affirmed.

RULE 36.26. Trial Counsel's Duties with Regard to Appeal.

Trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court, unless permitted by the trial court or the Arkansas Supreme Court to withdraw in the interest of justice or for other sufficient cause.

Rule 11.

ABSTRACTS AND BRIEFS, CRIMINAL CASES

(f) Appellant's Duty to File Abstract and Brief. — In all felony cases it is the duty of the appellant, whether he is represented by retained counsel, appointed counsel, or a public defender, or acts pro se, to abstract such parts of the record, but only such parts of the record, as are material to the points to be argued in his brief. (The former requirement that the Attorney General supply an abstract in felony cases no longer obtains.) The argument portion of the appellant's brief shall not exceed 25 double-spaced typewritten pages or 30 printed pages, with a similar 15 typewritten and 20 printed page limit upon the reply brief, except that if either limitation is shown to be too stringent in a particular case it may be waived by the Court on Motion. See paragraph (g) of this Rule with respect to the printing of an indigent's abstract and brief. The State's brief shall be subject to the same page limit.

When the sentence is death or life imprisonment, the Court must review all errors prejudicial to the appellant. Act 333 of 1971; Ark. Stat. Ann. § 43-2725 (Supp. 1973). To make that review possible the appellant must abstract all objections that were decided adversely to him in the trial court, together with such parts of the record as are needed for an understanding of the objection. The Attorney General will make certain that all objections have been so abstracted and will brief all points argued by the appellant and any other points that appear to him to involve prejudicial error.

(g) Printing of Abstracts and Briefs for Indigent Appellants. — When an indigent appellant is represented by appointed counsel or a public defender, his attorney may have the abstract and briefs printed by submitting the double-spaced typewritten manuscript to the Attorney General not later than the due date of the brief.

(h) Withdrawal of Counsel. — Any motion by counsel for a defendant in a criminal case for permission to withdraw made after notice of appeal has been given shall be addressed to this court, shall contain a statement of the reason for the request, and shall be served upon the defendant appealing. A request to withdraw on grounds that the appeal is wholly without merit shall be accompanied by a brief referring to anything in the record that might arguably support the appeal, together with a list of all objections made by the appellant and overruled by the court and of all motions and requests made by the appellant and denied by the court, accompanied by a statement as to the reason counsel considers that the points thus raised would not arguably support the appeal. The brief may be typewritten if counsel is representing an indigent person by appointment, as in other cases. The Clerk of this court shall furnish the appellant with a copy of his counsel's brief, and advise the appellant that he has 30 days within which to raise any points that he chooses and that this may be done in typewritten or hand-printed form and accompanied by his affidavit that he has not received any assistance from any inmate of the Department of Correction or of any other place of incarceration in the preparation of this response. The Clerk shall see that such responses by an appellant are served on the Attorney General who shall proceed to file his brief on behalf of the state pursuant to sections [subsections] (f) and (g) of this rule within 30 days after such service and to serve a copy of his brief on the appellant as well as on appellant's counsel. After a reply brief has been filed or after the time for filing such a brief has expired, the motion for withdrawal shall be submitted to the court as other motions are submitted. If, upon consideration of the motion, it shall appear to the court that the judgment of the trial court should be affirmed or reversed, the court may take such action on its own motion, without any supporting opinion. [Amended October 28, 1974; September 8, 1975; October 1, 1975; November 1, 1975; March 26, 1979; December 17, 1979; January 28, 1980; April 27, 1981; July 7, 1986.]

FILED

MAR 13 1989

LESLIE W. STEEN
CLERK

THIS IS A CAPITAL CASE AND
EXECUTION DATE IS IMMINENT

IN THE SUPREME COURT OF ARKANSAS

JONAS H. WHITMORE INDIVIDUALLY AND
AS NEXT FRIEND OF RONALD GENE SIMMONS — PETITIONERS

VS — NO. CR 89-45

STATE OF ARKANSAS — RESPONDENT

MOTION TO INTERVENE AND
FOR STAY OF EXECUTION

Comes Jonas H. Whitmore individually and as next friend of Ronald Gene Simmons and for his Motion To Intervene And For Stay of Execution, states:

1. Ronald Gene Simmons is an inmate on Arkansas death row whose execution is scheduled for March 16, 1989.

2. Jonas H. Whitmore is an inmate on Arkansas death row who is seeking permission to intervene as next friend of Ronald Gene Simmons.

3. There are important constitutional issues including the requirement of a constitutionally mandated appellate review in any capital case and Petitioner Whitmore intends to seek a writ of certiorari to the United States Supreme Court to review this question.

4. The execution date of Ronald Gene Simmons is so imminent that unless a stay of execution is granted by this Court, the important constitutional issues cannot be addressed through further legal action.

5. The Petitioner Jonas H. Whitmore is an interested party in that certain protected rights for both he and other present and future death row inmates are dependent upon further appellate review in behalf of Ronald Gene Simmons.

WHEREFORE, Jonas H. Whitmore acting individually and as next friend for Ronald Gene Simmons respectfully prays that he be allowed to intervene in this case for the purpose of seeking a writ of certiorari in the United States Supreme Court and that this Court grant a stay of execution of the March 16, 1989

execution date for Ronald Gene Simmons.

Respectfully submitted,

ARTHUR L. ALLEN
Allen & O'Hern
1700 First Commercial Building
Little Rock, Arkansas 72201
(501) 375-5040

COUNSEL FOR PETITIONER,
PRO BONO PUBLICO

CERTIFICATE OF SERVICE

I, Arthur L. Allen, do hereby certify that a true and correct copy of the foregoing application was served by hand delivery upon the Hon. Steve Clark, Attorney General of Arkansas, 200 Tower Building, Little Rock, Arkansas 72201, on this 13th day of March, 1989.

Arthur L. Allen

5-4-604. Aggravating circumstances.

Aggravating circumstances shall be limited to the following:

(1) The capital murder was committed by a person imprisoned as a result of a felony conviction;

(2) The capital murder was committed by a person unlawfully at liberty after being sentenced to imprisonment as a result of a felony conviction;

(3) The person previously committed another felony, an element of which was the use or threat of violence to another person or the creation of a substantial risk of death or serious physical injury to another person;

(4) The person in the commission of the capital murder knowingly created a great risk of death to a person other than the victim;

(5) The capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody;

(6) The capital murder was committed for pecuniary gain; or

(7) The capital murder was committed for the purpose of disrupting or hindering the lawful exercise of any government or political function.

(8) The capital murder was committed in an especially heinous, atrocious, or cruel manner.

5-4-605. Mitigating circumstances.

Mitigating circumstances shall include, but are not limited to, the following:

(1) The capital murder was committed while the defendant was under extreme mental or emotional disturbance;

(2) The capital murder was committed while the defendant was acting under unusual pressures or influences or under the domination of another person;

(3) The capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse;

(4) The youth of the defendant at the time of the commission of the capital murder;

(5) The capital murder was committed by another person and the defendant was an accomplice and his participation relatively minor;

(6) The defendant has no significant history of prior criminal activity.

5-4-606. Life imprisonment without parole.

A person sentenced to life imprisonment without parole shall be remanded to the custody of the Department of Correction for imprisonment for the remainder of his life and shall not be released except pursuant to commutation, pardon, or reprieve of the Governor.

5-4-607. Application for executive clemency — Regulations.

(a) The pardon of a person convicted of a capital murder, or the commutation of a sentence of a person so convicted may be granted only in the manner provided herein:

(1) Copies of the application for pardon or commutation shall be filed with:

(A) The Secretary of State;

(B) The Attorney General;

(C) The sheriff of the county in which the offense was committed;

(D) The prosecuting attorney of the judicial district in which the applicant was found guilty and sentenced, if still in office, and, if not, the successor of such prosecuting attorney; and

(E) The circuit judge presiding over the proceedings at which the applicant was found guilty and sentenced, if still in office, and, if not, the successor of such circuit judge.

(2) The application shall set forth the grounds upon which the pardon or commutation is asked and shall be published by two (2) insertions, separated by a minimum of seven (7) days, in a newspaper of general circulation in the county or counties in which the offense or offenses of the applicant were committed;

(3) On granting the application, the Governor shall include in his written order the reasons therefor, and shall file with each house of the General Assembly a copy of his order which shall state the applicant's name, the offense of which he was convicted and sentence imposed, the date of the judgment imposing the sentence, and the effective date of the pardon or commutation.

(b) A person sentenced to death or to life imprisonment without parole shall not be eligible for parole and shall not be paroled.

(c) If the sentence of a person sentenced to death or life imprisonment without parole is commuted by the Governor to a term of years, such person shall not be paroled, nor shall the length of his incarceration be reduced in any way to less than the full term of years specified in the order of commutation or in any subsequent orders of commutation.

(d) Reprieves may be granted as presently provided by law.

History. Acts 1975, No. 280, § 1306; 1977, No. 474, § 13; A.S.A. 1947, § 41-1306.

5-4-608. Waiver of death penalty.

(a) If a defendant is charged with capital murder, the prosecuting attorney, with the permission of the court, may waive the death penalty.

(b) In such cases, if the defendant pleads guilty to capital murder or is found guilty of capital murder after trial to the court or to a jury, the trial court shall sentence the defendant to life imprisonment without parole.

History. Acts 1975, No. 280, § 1307; 1977, No. 474, § 14; A.S.A. 1947, § 41-1307.

5-4-609 — 5-4-614. [Reserved.]

5-4-615. Conviction — Punishments.

A person convicted of a capital offense shall be punished by death by lethal injection or by life imprisonment without parole pursuant to this subchapter.

5-4-616. Procedures following remand of capital case after vacation of death sentence — Retroactive application.

Notwithstanding § 5-4-602(3), which requires that the same jury sit in the sentencing phase of a capital murder trial, the following shall apply:

(1) Upon any appeal by the defendant where the sentence is of death, the appellate court, if it finds prejudicial error in the sentencing proceeding only, may set aside the sentence of death and remand the case to the trial court in the jurisdiction in which the defendant was originally sentenced. No error in the sentencing proceeding shall result in the reversal of the conviction for a capital felony. When a capital case is remanded after vacation of a death sentence, the prosecutor may:

(A) Move the trial court to impose a sentence of life without parole, and the trial court may impose such sentence without a hearing;

(B) Move the trial court to impanel a new sentencing jury.

(2) If the prosecutor elects subdivision (1)(B) of this section, above, the trial court shall impanel a new jury for the purpose of conducting new sentencing proceedings;

(3) Resentencing proceedings shall be governed by the provisions of §§ 5-4-602(4) and 5-4-603 — 5-4-605;

(4) All exhibits and a transcript of all testimony and other evidence properly admitted in the prior trial and sentencing shall be admissible in the new sentencing proceeding; additional relevant evidence may be admitted including testimony of witnesses who testified at the previous trial;

(5) The provisions of this section are procedural; they shall apply retroactively to any defendant sentenced to death after January 1, 1974.

(6) This section shall not be construed to amend the provisions of § 5-4-602 requiring the same jury to sit in both the guilt and sentencing phases of the original trial.

5-4-617. Method of execution.

(a)(1) The punishment of death is to be administered by a continuous intravenous injection of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent until the defendant's death is pronounced according to accepted standards of medical practice.

(2) The Director of the Department of Correction shall determine the substances to be uniformly administered and the procedures to be used in any execution.

Supreme Court, U.S.
FILED
MAY 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

ORIGINAL

88-7146 (3)

NO. A-727

IN THE
SUPREME COURT OF THE UNITED STATES

October term, 1988

JONAS H. WHITMORE, INDIVIDUALLY,
AND AS NEXT FRIEND OF
RONALD GENE SIMMONS — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

RONALD GENE SIMMONS, SR. — RESPONDENT

RESPONDENT RONALD GENE SIMMONS, SR.'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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Ronald Gene Simmons, Sr.

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QUESTIONS PRESENTED

I.

Does the Constitutional ban against cruel and unusual punishment require that a mandatory appellate review be conducted in all cases in which the death penalty has been imposed?

II.

If mandatory appellate review of death penalty sentences is Constitutionally required, may that issue be raised by a third party?

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NO. A-727

IN THE
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VS.

STATE OF ARKANSAS — RESPONDENT

RONALD GENE SIMMONS, SR. — RESPONDENT

RESPONDENT RONALD GENE SIMMONS,SR.'S
RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARKANSAS

Respondent, Ronald Gene Simmons, Sr., by his attorneys, John Harris and Robert E. Irwin, respectfully prays that the Petitioner's writ of certiorari to review the judgment and opinion of the Supreme Court of Arkansas entered in this proceedings on March 13, 1989, in which Petitioner Whitmore was denied the right to intervene on behalf of Ronald Gene Simmons, Sr., an Arkansas inmate scheduled to die by lethal injection, be denied.

STATEMENT OF THE CASE

During the evening hours of March 15, 1989, Ronald Gene Simmons, Sr., was eating his last meal. His execution was set for the next day at 7:00 a.m., the 16th day of March, 1989. The Respondent Simmons, had previously been tried in two separate cases, convicted, and sentenced to death for capital murder of sixteen individuals, including fourteen family members. After each conviction and sentence of death, Respondent Simmons was fully advised by counsel of his right

to appeal, potential grounds for appeal, and many other things concerning the appellate process. Respondent Simmons took the position that whether or not to appeal was a personal decision that could only be made by him, and it was his decision that the verdicts in the two previous cases were just and proper, and his only request was that the sentence be carried out without any delay; that life was cruel for him and he was suffering with it. Immediately after Respondent Simmons took this position, parties opposed to capital punishment, including a Catholic Priest and other death row inmates, came forward in both the Simmons I and the Simmons II cases, and attempted to intervene and delay these two proceedings in the following particulars: First, by claiming next friend status, and second, by asserting that the United States Constitution required a mandatory appeal in death penalty cases that cannot be waived by the defendant.

The trial court immediately gave these interlopers a hearing on their petitions, and also conducted a competency hearing to determine whether or not Respondent Ronald Gene Simmons, Sr., was competent and had knowingly and intelligently waived his right to appeal. After a full hearing on these matters, the trial court ruled that Respondent Ronald Gene Simmons, Sr., was competent, that he had in fact knowingly and intelligently waived his right to appeal, and as such, the petitioners would have no standing as next friend or otherwise, and as a matter of law, there was no mandatory appeal that could not be waived by a competent defendant.

The trial court's decision in Simmons I was immediately appealed to the Arkansas Supreme Court; and the Arkansas Supreme Court, without any notice to Respondent Ronald Gene Simmons, Sr., and without any meaningful opportunity for him to be heard on the matter, granted the petitioners' request for stay of execution. However, ultimately, the Arkansas Supreme Court, after a full hearing on the matter, reversed

themselves and lifted the stay of execution, and specifically found that Respondent Ronald Gene Simmons, Sr., was competent and had knowingly and intelligently waived his right to appeal; that the petitioners as such would have no standing as next friend or otherwise; and that the law of Arkansas and the Constitution of the United States of America do not require a mandatory appeal that cannot be waived by a competent defendant.

Immediately thereafter, the petitioners in Simmons I filed for a petition for writ of habeas corpus in Federal District Court contending essentially the same things, and again, the Federal District Judge, without any notice to Respondent Ronald Gene Simmons, Sr., and without any meaningful opportunity for him to be heard on the issue, granted a stay of execution. Ultimately, after full hearings and elaborate briefs on the matter, the Federal District Judge reversed himself and lifted the stay of execution, ruling that Ronald Gene Simmons, Sr., was in fact competent and had knowingly and intelligently waived his right to appeal, and as such, petitioners would not have any standing as next friend or otherwise, and that the Constitution does not require a mandatory appeal that cannot be waived by a competent defendant as set out in the authority of Gilmore v. Utah, 429 U.S. 1012 (1976).

After this last ruling, as mentioned earlier, Respondent Ronald Gene Simmons, Sr., was enjoying his last meal on the 15th day of March, 1989, prior to being executed at 7:00 a.m. on the following morning, when he happened to notice the monitor on the TV in the room, a news flash that the U. S. Supreme Court had stayed his execution pursuant to an application for stay of execution pending petition for writ of certiorari to the Supreme Court of Arkansas, filed herein by Petitioner Jonas H. Whitmore, individually and as next friend of Ronald Gene Simmons. This stay of execution by the U. S. Supreme Court was granted without any notice

to Respondent Ronald Gene Simmons, Sr., and without any meaningful opportunity for him to be heard on the issue.

Subsequent to that ruling by the High Court, the petitioners in Simmons I filed a notice of appeal to the 8th Circuit Court of Appeals, and thereafter, filed a motion for stay of proceedings pending the outcome in the Simmons II case that is presently before the U. S. Supreme Court. The State of Arkansas, through its Attorney General's office, filed a response essentially acquiescing that the proceedings in the 8th Circuit Court of Appeals in Simmons I should be stayed pending the outcome of Simmons II before this court, and again, without any notice to Respondent Ronald Gene Simmons, Sr., and without any meaningful opportunity for him to be heard, the 8th Circuit Court of Appeals issued its order staying all of those proceedings pending the outcome of Simmons II before the U. S. Supreme Court.

After all of this, and at the request of Respondent Ronald Gene Simmons, Sr., four motions have been filed in this Court as follows: (1) a Motion Requesting Expedited Review of Petitioner's Petition for Writ of Certiorari to the Supreme Court of Arkansas, (2) Motion for Oral Argument, (3) Motion of Respondent Ronald Gene Simmons, Sr., to be Present at Oral Argument, and (4) Motion to Require Petitioner to Post Bond to Cover Costs, Expenses, and Potential Damages.

REASONS FOR NOT GRANTING THE WRIT

CERTIORARI SHOULD NOT BE GRANTED TO DETERMINE WHETHER THE 8TH AMENDMENT'S BAN ON CRUEL AND UNUSUAL PUNISHMENT REQUIRES THAT A MANDATORY APPELLATE REVIEW BE CONDUCTED WHEN A SENTENCE OF DEATH IS IMPOSED AND TO DETERMINE WHETHER A THIRD PARTY MAY ASSERT SUCH CONSTITUTIONAL RIGHT IN BEHALF OF THE PERSON SENTENCED.

A. MANDATORY APPEAL

The Constitution of the United States of America is approximately two hundred years old, having been adopted in 1787; and the first ten Amendments, including the Eighth

Amendment, prohibition against cruel and unusual punishment, was adopted shortly thereafter. Since that time, I think it would be safe to say that literally dozens, and perhaps hundreds of people have been sentenced to death, and had their sentences carried through without any appellate review; and the Petitioners have been unable to cite any case within the last two hundred years whereby the U. S. Supreme Court specifically required appellate review of a death sentence, notwithstanding the defendant's waiver of appellate review. The mere fact that no case exists within the last two hundred years specifically requiring mandatory appellate review, is good authority in and of itself that the Constitution does not require mandatory review. But even more compelling is the fact that there is authority to the contrary, modern authority of recent origin in the form of Gilmore v. Utah, 429 U.S. 1012 (1976). In that case, Gary Gilmore was attempting to do exactly what Ronald Gene Simmons, Sr., is attempting to do herein: merely accept the sentence of the Court and waive his rights to appellate review, so that the sentence may be carried out in an expeditious manner and relieve him from the punishments inflicted upon him by life itself under these circumstances. The fact that the U. S. Supreme Court allowed Gary Gilmore to waive his rights for further appellate review is clear precedent for the issue now being debated before this Court, and one cannot diminish the significance of Gilmore by contending that the only matter resolved in that case was the question of standing. Clearly the entire matter was before the Court, the Court being fully and completely advised of what Mr. Gilmore was attemting to do, and the Court by their decision thereby cleared the way for th sentence to be carried out without any appellate review. If that Court had thought that the U. S. Constitution mandated appellate review, surely they had the authority and would have had the inclination to point out to the parties in

that litigation that the Constitution required mandatory appellate review and that would have been the end of that matter. The fact that the Court did not set out any such requirement is ample authority for the proposition that the Constitution does not mandate appellate review even in a death sentence, if the defendant knowingly and intelligently waives his right to said review.

The Gilmore case being a U. S. Supreme Court case, constitutes the supreme law of this land. It has to this date never been overturned or overruled, nor has the Contitution of the United States, in particular the Eighth Amendment, been amended to afford any other relief. One cannot seek any higher authority for resolution of this question than the U. S. Supreme Court, and until Gilmore is overruled, it must be followed.

B. STANDING OF THIRD PARTY

Quoting from United States District Judge Garnett Thomas Eisele in his Order filed September 23, 1988, in the Simmons I case:

"In Gilmore v. Utah, supra, the Supreme Court applied the waiver doctrine to deny relief in a case nearly identical to the one before this Court. There, a convicted murderer sentenced to death indicated after his trial that he did not wish to pursue any appeals, including direct appeals to the State Supreme Court. Id., at 1013 n.1. His mother, attempting to act as next friend, brought the case before the United States Supreme Court, which issued a stay and ordered the State to file certain materials. Ten days later, after examining the State filings, the Court entered an Order terminating the stay:

> After carefully examining the materials submitted by the State of Utah, the Court is convinced that Gary Mark Gilmore made a knowing and intelligent waiver of any and all federal rights he mights have asserted after the Utah trail court's sentence was imposed, and, specifically, that the State's determinations of his

> competence to knowingly and intelligently waive any and all such rights were firmly grounded.

Chief Justice Burger filed a concurring opinion, joined by Justice Powell, in which he amplified the finding of a knowing and intelligent waiver. 429 U.S., at 1013-17. First of all, since the State had established that Gilmore was competent, his purported next friend could have no standing to proceed on Gilmore's behalf. Id., at 1014. Consequently,

> it is plain that the Court is without jurisdiction to entertain the "next friend" application filed by [Gilmore's mother]. This Court has jurisdiction pursuant to Art. III of the Constitution only over "cases and controversies," and we can issue stays only in aid of our jurisdiction. 28 U.S.C. ss. 1651, 2101(f). There is no dispute, presently before us, between Gary Mark Gilmore and the State of Utah, and the application of Bessie Gilmore manifestly fails to meet the statutory requirements to invoke this Court's power to review the action of the Supreme Court of Utah. No authority to the contrary has been brought to our attention, and nothing suggested in the dissent bears on the threshold question of jurisdiction.
>
> Id., at 1016."

The Gilmore v. Utah case is so directly on point on both the question of mandatory appeal and standing, that Respondent Ronald Gene Simmons, Sr., sees no necessity to cite any other cases or authorities for this matter; but in addition, this Respondent would like to state that it should be sufficient for a criminal defendant to have all of the power and the forces of the State of Arkansas assembled against him in an adversary proceeding. That, in itself, should be enough, but in this case, the petitioners want to eliminate the representation of Simmons' chosen lawyers to be substituted therewith by lawyers of petitioners' choice, to work, not for Simmons, but to work in furtherance of their own personal and political philosophies, and to specifically work against the express interest of Respondent Simmons. How patently unfair this seems on its face. Surely, common sense and reason will prevail in this matter, but the question has to be when. The petitioners in this case lost on these very arguments in the trial court below.

The petitioners in this case lost on these very arguments before the Arkansas Supreme Court. The petitioners in this case lost on these very arguments before the United States District Court. And now, for the fourth time, these petitioners are before this Court, and even though they lose here, as surely they must, they are winning every time a court grants a stay of execution in this matter, and they are winning their personal gains at the expense of the Respondent Simmons, both physically, mentally, and monetarily, at the expense of the victims of the crime, and their relatives and friends, at the expense of the taxpayers of the State of Arkansas, and at the expense of the public generally, of which the vast majority believe in capital punishment in a proper case. More particularly, the petitioners are subjecting the Respondent Simmons to cruel and unusual punishment in direct conflict with the Eighth Amendment to the United States Constitution. They have taken the matter away from the courts and are assuming the lofty position of deciding among themselves when and if Gene Simmons will be put to death. They have completely circumvented and thwarted the judicial process in this case, and others like them have thwarted the judicial process in capital cases in this Country for decades.

In a democracy, the majority should rule, and since the majority of the people of this State and this Nation believe in capital punishment, the law of this land and the law of this State clearly provide for capital punishment in a proper case, but the State of Arkansas has been ineffectual in enforcing this law, and our criminal justice system is in much disrespect for it. In the State of Arkansas alone, for the past twenty-five years there has been no enforcement of capital punishment; and according to a recent U.P.I. release from the Bureau of Justice Statistics, an arm of the Justice Department, it is reported that only twenty-five

people were executed in eight States in 1987, the most since the Supreme Court reinstated the death penalty in 1976, and as of December 1, 1988, a record of 1,984 offenders were on death row in thirty-four States. Obviously from these statistics, capital punishment in Arkansas is purely illusory. It cannot in this form serve as any deterent. Therefore, with all due respect, this writer would assert that society demands that capital punishment be enforced fairly and expeditiously,or in the alternative, be abolished in its entirety.

Respondent Simmons conterds that since obviously the petitioners have no standing to intervene in this matter, this Court should be without jurisdiction to make any decisions adverse to him, and that the decision of whether or not to appeal is a personal decision that can be exercised only by him.

As a matter of fact and law, assume arguendo or hypothetically, if Respondent Ronald Gene Simmons, Sr., were offered a pardon, would the Petitioner Jonas H. Whatmore, a death row inmate, or anyone else, have standing to deny Respondent Simmons a pardon so that crimes such as Simmons' may be included within the data base and thereby inure to the benefit of Petitioner Whitmore? I think not. Whether or not a defendant even accepts a pardon is a personal decision for the defendant to make, the same as the defendant's right to appeal or not to appeal.

CONCLUSION

For the foregoing reasons, this Court should deny certiorari to determine whether the Eighth Amendment's ban against cruel and unusual punishment requires mandatory appellate review in death penalty cases, and whether the right may be asserted by a third party.

Respectfully submitted,

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NO. A-727

IN THE
SUPREME COURT OF THE UNITED STATES

October term, 1988

JONAS H. WHITMORE, INDIVIDUALLY,
AND AS NEXT FRIEND OF
RONALD GENE SIMMONS — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

RONALD GENE SIMMONS, SR. — RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that the annexed Response to Petition for Writ of Certiorari to the Supreme Court of Arkansas has been timely filed, pursuant to Rule 28.2 of the Rules of this Court by sending a copy via United States Mail postage pre-paid, addressed to the Clerk of this Court.

I further certify that I served the said Response to Petition for Writ of Certiorari on Petitioner and Respondent State of Arkansas, by placing a copy in the United States Mail, first class, postage pre-paid, addressed as follows:

Arthur L. Allen
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First Commercial Building
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Tower Building, Suite 200
Fourth and Center Streets
Little Rock, AR 72201

Done this 22nd day of May, 1989.

John Harris
Attorney for Respondent Ronald Gene Simmons, Sr.

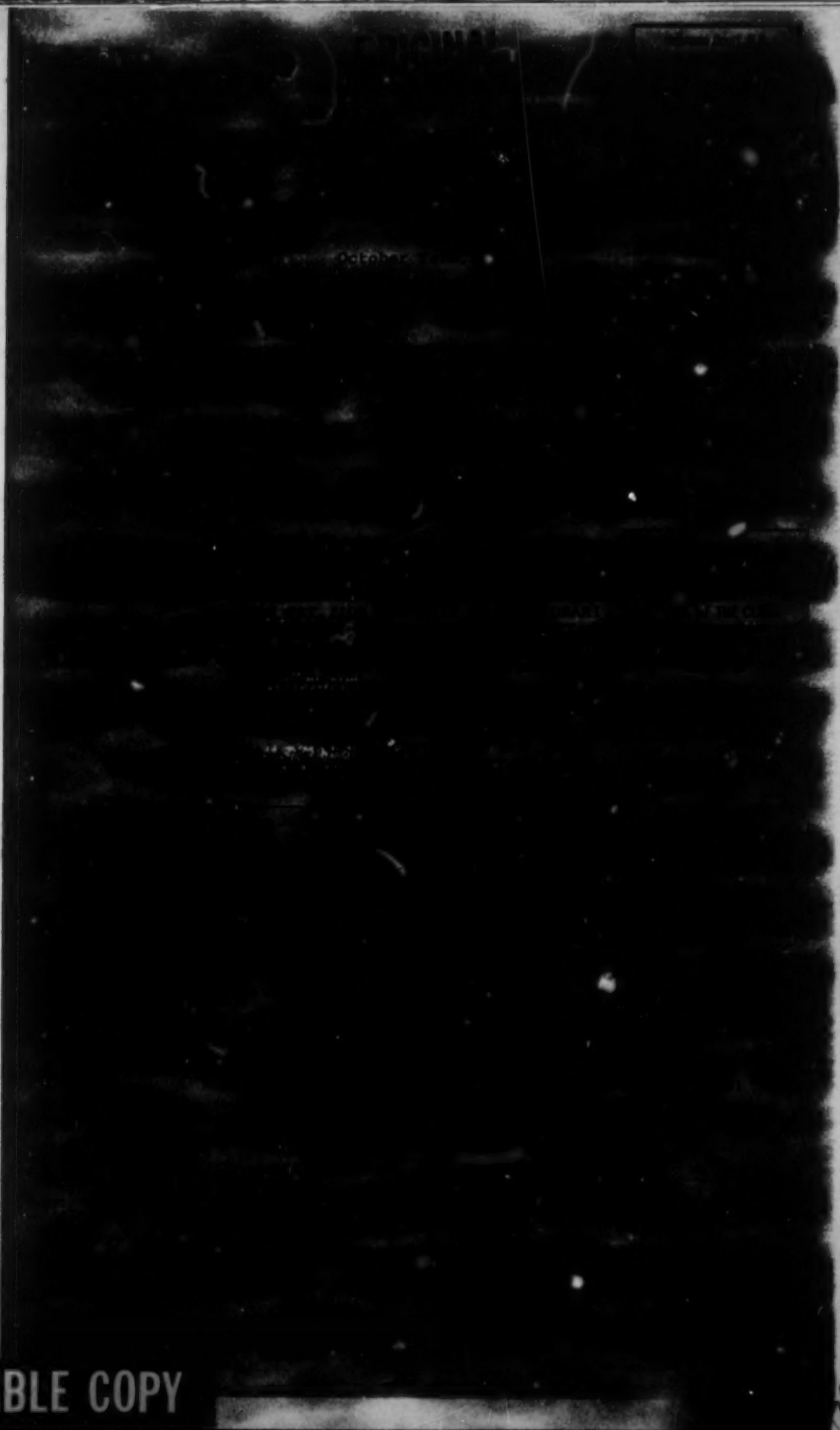
STATE OF ARKANSAS
COUNTY OF POPE

Subscribed and sworn to before me, Notary Public, on this 22nd day of May, 1989.

Notary Public

My commission expires:
4-25-90

(4)



BEST AVAILABLE COPY

QUESTIONS PRESENTED

I.

WHETHER ARKANSAS' CAPITAL SENTENCING PROCEDURE IS SUFFICIENT TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY DESPITE THE ABSENCE OF A MANDATORY DIRECT APPEAL TO THE ARKANSAS SUPREME COURT.

II.

WHETHER A THIRD PARTY, NOT OTHERWISE CONNECTED WITH THE CASE, MAY PROSECUTE A DIRECT APPEAL TO A STATE APPELLATE COURT IN A DEATH PENALTY CASE AS NEXT FRIEND OF A MENTALLY COMPETENT DEFENDANT.

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JURISDICTION

Respondent submits that this Court has no jurisdiction pursuant to 28 U.S.C. § 1257(3) to issue a writ of certiorari in the instant case because Whitmore lacks standing to assert the right of Ronald Gene Simmons to a direct appeal to the Arkansas Supreme Court of his capital murder conviction and sentence of death.

NO. 88-7146

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

JONAS H. WHITMORE,
INDIVIDUALLY AND AS NEXT FRIEND
OF RONALD GENE SIMMONS — PETITIONER

V.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT

RESPONDENT STATE OF ARKANSAS' BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

The State of Arkansas, the respondent herein, opposes the petition of Jonas Whitmore requesting a writ of certiorari to review the judgment of the Arkansas Supreme Court denying his motion to intervene as next friend of Ronald Gene Simmons.

OPINIONS BELOW

Before the Arkansas Supreme Court, petitioner Jonas Whitmore attempted to intervene in a petition filed by Ronald Gene Simmons in which Simmons requested expedited review of his waiver of a direct appeal of his capital murder conviction and death sentence. The Arkansas Supreme Court denied Whitmore's motion to intervene in Simmons v. State, 298 Ark. 255, 766 S.W.2d 423 (1989). The Arkansas Supreme Court affirmed Ronald Gene Simmons' waiver of his right to a direct appeal to that court in Simmons v. State, 298 Ark. 193, 766 S.w.2d 422 (1989).

STATEMENT OF THE CASE

On December 28, 1987 Ronald Gene Simmons went on a murderous rampage in the town of Russellville, Arkansas. Within approximately 30 minutes, at four different locations in Russellville, Simmons shot at six people with a .22 caliber pistol. Of these six intended victims, Simmons actually shot five, of whom two died as a result of their wounds. After Russellville police officers arrested Simmons, the Pope County Sheriff's Department searched Simmons' house, located at Dover, Arkansas, on the afternoon of December 28 and continued to search on the next day, December 29. In the course of this search, the deputy sheriffs discovered the bodies of sixteen members of Simmons' family. All had been murdered. Five of the victims were found in Simmons' house. Seven were buried in a shallow grave near the house. Two victims, infants, were found in the trunks of two junk automobiles located near the house.

On the basis of all these killings, the State of Arkansas filed two sets of criminal charges against Simmons. Simmons was tried for the Russellville crimes in May of 1988 in Franklin County Circuit Court (hereinafter Simmons I). Subsequently, in February of 1989, Simmons was tried in Johnson County Circuit Court for the murders of the sixteen members of his family whose bodies were discovered on December 28-29 (hereinafter Simmons II). The result of both trials was the same. A jury found Simmons guilty of capital murder and sentenced him to die.

With respect to Simmons I, Simmons made known to the trial court that he did not wish to directly appeal to the Arkansas Supreme Court the validity of his convictions for capital murder and attempted capital murder. On May 16, 1988 the Franklin County Circuit Court heard expert testimony concerning Simmons' mental competence to make a voluntary waiver of his right to a direct appeal to the

Arkansas Supreme Court. After hearing this expert testimony, the trial court found that Simmons was sufficiently mental competent to voluntarily waive his right to a direct appeal. The correctness of this finding of fact by the Franklin County Circuit Court was challenged by Rev. Louis Franz, who filed with the trial court a petition requesting permission to prosecute a direct appeal on Simmons' behalf to the Arkansas Supreme Court as Simmons' next friend. Reverend Franz had no connection to Simmons or to the crimes that were the subject of Simmons I. Reverend Franz simply appointed himself the champion of Simmons' right to a direct appeal and then interjected himself into Simmons I. On December 17, 1988 the Franklin County Circuit Court held a second hearing in order to determine Simmons' mental competence to waive a direct appeal to the Arkansas Supreme Court. After hearing additional expert testimony at this hearing, the Franklin County Circuit Court found that Simmons was sufficiently mental competent to waive his right to a direct appeal to the Arkansas Supreme Court.

Reverend Franz carried his fight to intervene in Simmons I on behalf of Simmons as next friend to the Arkansas Supreme Court. On June 20, 1988, at the request of Reverend Franz, the Arkansas Supreme Court stayed Simmons' execution and ordered Franz and the State to submit briefs addressing three issues: (1) whether there should be a mandatory direct appeal to the Arkansas Supreme Court in death penalty cases; (2) whether Reverend Franz had standing to assert Simmons' alleged right to a direct appeal to the Arkansas Supreme Court; and (3) whether Simmons was sufficiently mentally competent to make a voluntary waiver of his right to a direct appeal to the Arkansas Supreme Court. Franz v. State, 296 Ark. 111, 751 S.W.2d 355 (1988). After reviewing the briefs submitted by the parties and transcripts of these two competency hearings that were held by the Franklin County Circuit Court, the Arkansas Supreme Court issued an

opinion in which it held that Reverend Franz did not have standing to assert, as next friend, Simmons' right to a direct appeal to the Arkansas Supreme Court and that neither the Eighth Amendment to the United States Constitution nor any Arkansas case law or rule of procedure required that there must be a direct appeal in a case where a defendant has received the death penalty. Franz v. State, 296 Ark. 181, 754 S.W.2d 839 (1988).

After this loss at the Arkansas Supreme Court, Franz next tried the United States District Court for the Eastern District of Arkansas as a forum from which he could intervene in Simmons I to force a direct appeal on Simmons. The United States District Court for the Eastern District of Arkansas ordered yet additional briefs, had Simmons examined at the Medical Center for Federal Prisoners in Springfield, Missouri, and had an independent counsel prepare a lengthy report in order to advise Simmons as to whether there were any reversible errors that occurred in Simmons I. The District Court eventually held that Simmons was sufficiently mentally competent to waive his right to a direct appeal to the Arkansas Suprme Court and, therefore, Reverend Franz had no standing as next friend to assert Simmons' right to a direct appeal. Franz v. Lockhart, 700 F.Supp. 1005 (E.D. Ark. 1988). In Franz the District Court also held that the Eighth Amendment to the United States Constitution requires that there be at least one review by an appellate court before a state may impose on a defendant the penalty of death. Franz has appealed to the United States Eighth Circuit Court of Appeals the District Court's denial of his petition seeking a writ of habeas corpus as next friend of Simmons and this appeal has been stayed pending the resolution of the instant petition to this Court.

With respect to Simmons II (the instant case), on March 1, 1989 the Johnson County Circuit Court held an evidentiary hearing in order to determine whether Simmons

was sufficiently mentally competent in order to waive his right to a direct appeal to the Arkansas Supreme Court of his conviction of capital murder and death sentence for killing 16 members of his family. The Johnson County Circuit Court reviewed the information in its file from Simmons I concerning Simmons' mental competence, heard additional testimony from Simmons and then found that Simmoms was sufficiently mentally competent in order to waive his right to a direct appeal. The Arkansas Supreme Court affirmed this finding of fact on March 10, 1989 in Simmons v. State, 298 Ark. 193, 766 S.W.2d 422 (1989). Three days later, on March 13, 1989, Jonas Whitmore, petitioner in the instant case, filed a motion to intervene in Simmons II with the Arkansas Supreme Court. The Arkansas Supreme Court denied Whitmore's motion to intervene on the same day in Simmons v. State, 298 Ark. 255, 766 S.W.2d 423. At this point, the death sentence that Simmons had received in Simons II was to be carried out on March 15, 1989. After the Arkansas Supreme Court denied his motion to intervene, Whitmore petitioned this Court, as next friend of Ronald Gene Simmons, to stay the March 15, 1989 execution. In an order dated March 15, 1989 this Court did stay the execution that had been set for March 15, 1989 and ordered that the stay remain in effect pending Whitmore's filing of a petition seeking a writ of certiorari to the Arkansas Supreme Court. The instant brief is filed with this Court in opposition to Whitmore's petition for a writ of certiorari to the Arkansas Supreme Court.

I.

THIS COURT SHOULD DENY PETITIONER WHITMORE'S PETITION FOR WRIT OF CERTIORARI BECAUSE ARKANSAS' CAPITAL SENTENCING PROCEDURE IS SUFFICIENT TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY DESPITE THE ABSENCE OF A MANDATORY DIRECT APPEAL TO THE ARKANSAS SUPREME COURT.

According to petitioner Whitmore, the substantive issue presented in this case is whether the Eighth Amendment's prohibition against cruel and unusual punishment mandates a direct appeal of all capital murder convictions and resulting death sentences.[1] Respondent, the State of Arkansas, disagrees with Whitmore's framing of the issue. The issue presented in this case is not whether, as an abstract matter, the Eighth Amendment requires a direct appeal of all capital murder convictions and resulting death sentences. The issue, properly framed, is whether Arkansas' capital sentence procedure is so deficient that a mandatory direct appeal to the Arkansas Supreme Court is necessary to prevent the arbitrary, capricious imposition of death sentences by Arkansas juries following Arkansas' capital sentencing procedure. Arkansas' capital sentencing procedure, taken as a distinct whole, must be examined in order to determine if the Eighth Amendment requires that Arkansas' death penalty sentencing procedure have the feature of a mandatory direct appeal to the Arkansas Supreme Court. See Pulley v. Harris, 465 U.S. 37, 45 (1984) and Gregg v. Georgia, 428 U.S. 153, 195 (1976). According to this Court's opinions in Gregg and Pulley, Arkansas' capital sentencing procedure is not necessarily violative of the Eighth Amendment because it lacks the feature of a mandatory direct appeal. What the Eighth Amendment requires is not an appeal for the sake of the extra measure of reliability in the correctness of a verdict and sentence that appellate

[1] The due process clause of the Fourteenth Amendment incorporates the Eighth Amendment's prohibition against cruel and unusual punishment; therefore, the Eighth Amendment's prohibition is obligatory on the fifty states. Robinson v. California, 370 U.S. 660 (1962).

review provides, but that a defendant be sentenced to death in a manner that is not irrational, arbitrary or capricious. Pulley at 54. In this regard, it is important to note that this Court has recognized that there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death." Pulley at 54 and Zant v. Stephens, 462 U.S. 862, 884-85 (1983).

Is Arkansas' death penalty sentencing procedure so deficient that the Eighth Amendment prevents the State from accepting an otherwise valid waiver of a right to a direct appeal to the Arkansas Supreme Court by a defendant who has been sentenced to die by an Arkansas jury?[2] The two lower courts that have considered this issue have disagreed. In Collins v. State, 261 Ark. 195, 203-11, 548 S.W.2d 106, 111-15, cert. denied, 434 U.S. 678 (1977) and again in Franz v. State, 296 Ark. 181, 186-88, 754 S.W.2d 839, 842-43 (1988) (Simmons I) the Arkansas Supreme Court held that the absence of a mandatory direct appeal was not a "make or break" feature of Arkansas' death penalty sentencing procedure. The United States District Court for the Eastern District of Arkansas reached the opposite conclusion in Franz v. Lockhart, 700 F.Supp. 1005, 1014-24 (1988) (Simmons I). Study of Collins and Ark. Code Ann. §§ 5-4-601-07 reveals the following features of Arkansas' death penalty sentencing procedure that prohibit Arkansas juries from

[2]Arkansas' death penalty sentencing procedure is set forth in Ark. Code Ann. §§ 5-4-601-07 (1987). Aside from the absence of a mandatory appeal, Arkansas' death penalty sentencing procedure is virtually identical to the state procedures that were approved by this Court in Gregg v. Georgia, 428 U.S. 153 (1976) and Proffitt v. Florida, 428 U.S. 242 (1976). In addition, pursuant to Arkansas Rule of Criminal Procedure 36.24, Ark. Sup. Ct. Rule 11(f) and Ark. Code Ann. § 16-91-113(a) (1987), once a capital murder conviction and sentence are appealed to the Arkansas Supreme Court the court will review all of the trial court's rulings that were adverse to the defendant whether or not the defendant advances the adverse ruling as an issue on appeal. This comprehensive review by the Arkansas Supreme Court is not, however, a review for plain error. See Parker v. State, 292 Ark. 421, 436, 731 S.W.2d 756, 764 (1987) and Fretwell v. State, 289 Ark. 91, 98, 708 S.W.2d 630, 634 (1986).

imposing a death sentence in a way that is fundamentally arbitrary and capricious: (1) in a separate sentencing hearing the jury must unanimously find that at least one of eight statutory aggravating circumstances exists beyond a reasonable doubt; (2) the jury must find that the aggravating circumstance or circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; (3) the jury must find that the aggravating circumstance or circumstances must justify a sentence of death beyond a reasonable doubt; (4) the aggravating circumstances themselves have been approved by this Court in Gregg, supra and Proffitt, supra; (5) the defendant is permitted to offer to the jury a very wide range of evidence in mitigation (see, e.g., Pickens v. State, 292 Ark. 362, 730 S.W.2d 230, cert. denied sub nom., Arkansas v. Pickens, 108 S. Ct. 269 (1987) (on resentencing, defendant may offer as mitigation proof of his good behavior on death row)); (6) the definition of capital murder in Ark. Code Ann. § 5-10-101 (1987) is limited to seven kinds of felony murder and murder committed with a premeditated and deliberated mental state;[1] (7) the trial court has the authority, in its discretion, to reduce a death sentence to life imprisonment. These features of the Arkansas' death penalty sentencing process, when considered as a whole, insure that defendants will not be sentenced to death by Arkansas juries in a manner that is fundamentally arbitrary or capricious.

Respondent the State of Arkansas acknowledges that the opinion of the United States District Court in Franz v. Lockhart, supra, is correct insofar as it holds that the feature of a mandatory direct appeal will provide an additional measure of reliability with respect to the imposition of a death sentence only on defendants who truly

[1]Arkansas has recently amended its definition of capital murder to add single-victim killings done with premeditation and deliberation. See 1989 Ark. Acts No. 856. This amendment becomes effective on July 2, 1989.

deserve to die as punishment for murder. See Franz v. Lockhart at 1022; see also Strafer, Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 J. Crim. L. & Criminology 860, 895-908 (1983). The short answer to the District Court's conclusion that Arkansas' death penalty sentencing process violates the Eight Amendment because it lacks the feature of a mandatory appeal is that this Court has never interpreted the Eighth Amendment to require meticulous, computer-like exactitude in the imposition of the death penalty. See Pulley v. Harris, 465 U.S. 37, 54 (1984). Since its landmark decision in Furman v. Georgia, 408 U.S. 238 (1972) this Court has interpreted the Eighth Amendment to require only that death sentences not be imposed in a manner that is fundamentally arbitrary and capricious. The features of Arkansas' death penalty sentencing procedure noted above ensure that Arkansas juries will not impose death sentences in a manner that is fundamentally arbitrary and capricious. It is true that all the other states that have a death penalty do have some sort of mandatory appellate review, however, this Court has held that the Eighth Amendment does not require absolute symmetry between the states with respect to their death penalty sentencing procedures. See Spaziano v. Florida, 468 U.S. 447, 464 (1984). To put the matter another way, Spaziano holds that a show of hands does not necessarily establish an Eighth Amendment requirement.

II.

THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI REQUESTED BY WHITMORE BECAUSE WHITMORE LACKS STANDING AND HE CANNOT BE A NEXT FRIEND OF RONALD GENE SIMMONS.

Whitmore asserts that he should have standing as next friend of Ronald Gene Simmons to argue that the Eighth Amendment requires that there be a direct appeal of Simmons' capital murder conviction and death sentence to the Arkansas Supreme Court. The short answer to this assertion by Whitmore is that he has no standing to assert Simmons' right

to a direct appeal as Simmons' next friend. Whitmore has no standing because he cannot satisfy the "case or controversy" requirement of Article III of the United States Constitution and because Whitmore cannot establish that Simmons is not sufficiently mentally competent to waive his right to a direct appeal.

In his petition Whitmore fails to demonstrate that he has any connection to Simmons or to Simmons' case except for the fact that Whitmore, like Simmons, is an inmate on Arkansas' death row.[4] This Court has repeatedly held that third parties, not otherwise connected with a case, who step forward to champion a cause have no standing to assert the legal rights of the genuine parties at interest. See Allen v. Wright, 468 U.S. 737, 754 (1984); O'Shea v. Littleton, 414 U.S. 488, 493-4 (1974); and Tileston v. Ullman, 318 U.S. 44 (1943). Third party "champions" such as Whitmore lack standing because they cannot satisfy the "case or controversy" requirement of Article III of the United States Constitution. This Court had held that would-be plaintiffs have standing to vindicate the rights of genuine parties at interest if: (1) the would-be plaintiff shows that he has personally suffered some actual or threatened injury as a result of the allegedly illegal conduct of the defendant; (2) the would-be plaintiff must show that the injury fairly can be traced to the challenged conduct of the defendant; and (3) the would-be plaintiff must show that the injury is likely to be redressed by a favorable decision. See Allen v. Wright, supra; Valley Forge College v. Americans United,

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[4]Whitmore has had a direct appeal, which was unsuccessful, to the Arkansas Supreme Court. Whitmore v. State, 296 Ark. 308, 756 S.W.2d 890 (1988). In addition, the Arkansas Supreme Court denied Whitmore post-conviction relief in Whitmore v. State, No. CR87-168 (May 30, 1989). In its Whitmore opinion of May 30, 1989, the Arkansas Supreme Court not only denied Whitmore post-conviction relief but also announced the virtual abolition of state post-conviction relief. The Arkansas Supreme Court's decision to abolish post-conviction relief in Arkansas was prompted, in part, by Whitmore's filing of the instant petition seeking a writ of certiorari with this Court.

454 U.S. 464, 472 (1982); and Baker v. Carr, 369 U.S. 186, 204 (1962); see also 13 Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction § 3531.9 at 452-56, 567-69 (2d ed. 1984).

In his petition Whitmore fails to explain how it is that he will suffer some actual injury if Simmons' does not challenge the validity of his capital murder conviction and death sentence by filing a direct appeal with the Arkansas Supreme Court. In truth, Whitmore cannot do so. Whitmore has had a direct appeal of his capital murder conviction and death sentence. Whitmore v. State, 296 Ark. 308, 756 S.W.2d 890 (1988). Given that Whitmore has had a direct appeal of his capital murder conviction and death sentence, any constitutional defect in Arkansas' death penalty sentencing procedure that exists because of the absence of a mandatory direct appeal to the Arkansas Supreme Court will have no effect on Whitmore. In his direct appeal to the Arkansas Supreme Court, that court did apply Arkansas Rule of Criminal Procedure 11(f). This state rule of criminal procedure requires that the Arkansas Supreme Court examine the entire record of the appellant's trial to make sure that all rulings by the state trial court that were adverse to the appellant were not so prejudicial that they would require reversal of the appellant's conviction or sentence. Because the Arkansas Supreme Court did apply Rule 11(f) to the record of Whitmore's state trial, he would suffer no prejudice if the Arkansas Supreme Court did not apply Rule 11(f) to Simmons because Simmons failed to file a direct appeal with the Arkansas Supreme Court.

In addition, Whitmore's claim that the robbery/murder that he committed will not seem so bad, by way of comparative review by the Arkansas Supreme Court, to the murders that Simmons committed is, by the terms of Whitmore's petition, entirely speculative. Whitmore's argument in this regard depends upon his capital murder conviction and death sentence, which the Arkansas Supreme

Court has already affirmed, being reversed and remanded at some indefinite period in the future by some state or federal court. Whitmore has completely failed to allege in his petition that there is even a remote possibility that his own conviction and sentence will be reversed. It is only if Whitmore's sentence and conviction are reversed that he would be able to minimize the reprehensibility of the murder that he committed by comparing it to the murders that Simmons committed. Until Whitmore can demonstrate some possibility that his conviction or sentence could be reversed and that he could face the death penalty a second time, his "compared-to-Simmons-I-dont't-look-so-bad" argument is too speculative to warrant the conclusion that Whitmore will suffer an irreparable injury if the Arkansas Supreme Court does not review Simmons' conviction and sentence.

Whitmore could evade the Article III bar to his championing of Simmons' right to a direct appeal if Whitmore could demonstrate that he was Simmons' next friend.[1] In order to establish his status as Simmons' next friend, Whitmore must show that he has some relationship with Simmons beyond that of uninvited intruder and Whitmore must also establish that Simmons is not sufficiently mentally competent to voluntarily waive his right to a direct appeal to the Arkansas Supreme Court. See Wilson v. Lane, 870 F.2d 1250, 1253 (7th Cir. 1989); Smith v. Armontrout, 812 F.2d 1050, 1053 (8th Cir), cert. denied, 107 S. Ct. 3277 (1987); and Strafer, Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 J. Crim. L. & Criminology 860, 909 n.211 (1983). This Court has repeatedly held that would-be next friends cannot assert the rights of a defendant if the defendant is sufficiently mentally competent to decide himself whether he

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[1]Petitions seeking relief pursuant to 28 U.S.C. § 2254 may be filed by a "next friend." 28 U.S.C. § 2242.

will assert his rights. Gilmore v. Utah, 429 U.S. 1012 (1977) and Rosenberg v. United States, 346 U.S. 273, 291 (1953). A record of Simmons' mental competence was extensively developed in Simmons I and was reviewed by the state trial court and by the Arkansas Supreme Court in the instant case, which is Simmons II. The state trial court, the Arkansas Supreme Court and the United States District Court for the Eastern District of Arkansas have all held that Simmons was mentally competent and not, therefore, in need of a next friend. (The United States District Court for the Eastern District of Arkansas reached this decision with respect to Simmons I). The Arkansas courts' finding of fact that Simmons is sufficiently mentally competent to voluntarily waive his right to a direct appeal is entitled to the presumption of correctness set forth in 28 U.S.C. § 2254(d). See Maggio v. Fulford, 462 U.S. 111 (1983) and Franz v. Lockhart, 700 F.Supp. 1005, 1025 (E.D. Ark. 1988). Whitmore fails to assert in his petition that Simmons is presently incompetent. Because Whitmore has failed to demonstrate even a slight possibility that Simmons is presently incompetent, Whitmore cannot assert Simmons' right to a direct appeal as Simmons' next friend. In this respect, the instant case is identical to Gilmore, supra, and should be controlled by it.

CONCLUSION

For the reasons noted above, respondent, the State of Arkansas, respectfully requests that this Court deny petitioner Whitmore's petition requesting a writ of certiorari to the Arkansas Supreme Court.

No. 88-7146 (5)

Supreme Court, U.S.
FILED
AUG 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

JONAS H. WHITMORE, INDIVIDUALLY
AND AS NEXT FRIEND OF RONALD GENE SIMMONS

Petitioner,

vs.

ARKANSAS, et al.

Respondents.

On Writ of Certiorari
to the Arkansas Supreme Court

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED ON MAY 3, 1989.
CERTIORARI GRANTED ON JULY 3, 1989.

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
May 16, 1988	Ronald Gene Simmons is convicted of capital murder in the deaths of two Russellville, Arkansas residents and sentenced to death (Simmons I). He expresses wish that no appeal be taken.
June 7, 1988	Fr. Louis Franz files "next-friend" petition with Arkansas Supreme Court asserting constitutional requirement of mandatory appeal.
July 11, 1988	Arkansas Supreme Court issues its opinion in *Franz v. State* (Simmons I) holding that Fr. Franz has no standing to intervene and that mandatory appellate review is not constitutionally required.
August 2, 1988	Fr. Franz files federal habeas corpus action in U. S. District Court for the Eastern District of Arkansas as "next-friend" of Ronald Gene Simmons (Simmons I).
Sept. 23, 1988	U. S. District Court for Eastern District of Arkansas, Hon. G. Thomas Eisele, issues Opinion and Order in *Franz v. Lockhart*, (Simmons I) finding that mandatory appellate review is constitutionally required but denying the writ on the basis of the lack of standing of the third party, Fr. Franz.

Feb. 10, 1989	Ronald Gene Simmons is convicted of capital murder for the deaths of fourteen family members and sentenced to death by lethal injection on March 16, 1989. Simmons expresses desire that no appeal be taken (Simmons II – the instant case).
March 1, 1989	Trial court holds competency hearing and determines that Ronald Gene Simmons is competent to waive the appeal of his death sentence (Simmons II).
March 10, 1989	Arkansas Supreme Court issues opinion on expedited review of waiver of direct appeal and finds the waiver to be valid and that execution may be carried out on March 16, 1989. (Simmons II)
March 13, 1989	Jonas H. Whitmore files "next-friend" petition with Arkansas Supreme Court seeking permission to intervene and for stay of execution (Simmons II)
March 13, 1989	Arkansas Supreme Court issues *per curiam* order denying intervention by Whitmore (Simmons II).
March 13, 1989	Application for Stay of Execution pending Petition for Writ of Certiorari is directed to Blackmun, J., as Circuit Justice for Eighth Circuit. (Simmons II)
March 15, 1989	Stay of Execution granted by United States Supreme Court
March 27, 1989	Appeal of *Franz v. Lockhart* lodged with Eighth Circuit Court of Appeals (Simmons I)
May 3, 1989	Petition for Writ of Certiorari filed with United States Supreme Court.

July 3, 1989	Petition for Writ of Certiorari to the Arkansas Supreme Court is granted by this Court.

SUPREME COURT OF ARKANSAS
No. CR 88-76

	)	Opinion Delivered
	)	JUL 11 1988
	)	
REV. LOUIS J. FRANZ,	)	PETITION TO
INDIVIDUALLY AND	)	INTERVENE
AS NEXT FRIEND	)	AS NEXT FRIEND;
OF RONALD	)	
GENE SIMMONS,	)	
PETITIONER,	)	
	)	
V.	)	
	)	
STATE OF ARKANSAS,	)	
RESPONDENT.	)	PETITION DENIED.
	)	

ROBERT H. DUDLEY, Associate Justice

On May 16, 1988, Ronald Gene Simmons was convicted of capital murder and sentenced to death in the Circuit Court of Franklin County. Immediately after being sentenced, Simmons took the stand and made a statement that included the following: "I, Ronald Gene Simmons, Sr., want it to be known that it is my wish and my desire that absolutely no action by anybody be taken to appeal or in any way change this sentence. It is further respectfully requested that this sentence be carried out expeditiously." Even after the trial court set a date for execution, Simmons refused to exercise his unqualified right of appeal. The trial court subsequently conducted a hearing and found that Simmons was competent to waive his right to an appeal and that his decision on the waiver was knowingly and intelligently made. As the date for

execution neared, Rev. Louis J. Franz petitioned this Court to allow him to proceed in this Court on Simmons' behalf as next friend, asked for a stay of execution, and asked that we make appeal mandatory in death cases. We granted a stay of execution and asked the parties and the petitioner to file briefs on (1) whether the petitioner has standing; (2) whether this Court should change its rules to require mandatory review of death cases; (3) if there is no rule change to require mandatory review of death cases, whether a decision to waive appeal in a death case should be reviewed by this Court; and (4) if appeal may be waived, whether the defendant in this case understood the choice of life or death and knowingly and intelligently made that choice. Briefs have been received and oral arguments have been heard on the issues.

1. Standing of Rev. Franz

The requirements of next friend standing are twofold. *See, e.g., Davis v. Austin*, 492 F. Supp. 273 (N.D. Ga. 1980). The *Davis* court noted, "The petitioners must first meet the threshold requirement of showing they are 'next friends.' If that showing is made, petitioners must also demonstrate that a 'next friend' suit is maintainable because the person on whose behalf they act is incompetent." *Id.* at 275.

As to the first requirement, the qualification as a next friend, the *Davis* court noted:

> The case law does not establish an easily applied test as concerning the requirements for standing as "next friend." The cases establish that such actions may be appropriate in cases of infancy, lack of time, and incompetency. *United States v. Preiser*, 506 F.2d 1115, 1126 n.8 (2d Cir. 1974). Although the relationship and interest of

> the proposed "next friend" is to be considered by the court before it entertains such an action, the cases do not adequately define who might act as next friend. *See Weber v. Garza*, 570 F.2d 511 (5th Cir. 1978). The court must start with the proposition that members of the public in general do not have a right to intercede as "next friend" in an action such as this because they are morally or philosophically opposed to the death penalty. On the other end of the scale, close relatives, such as a parent, spouse, or sibling, who maintain a close personal relationship with the aggrieved, would be appropriate persons to maintain a "next friend" action.

Davis, 492 F. Supp. at 275.

The facts of the Davis case are similar to the facts in this case. One of the persons seeking "next friend" status in *Davis* was the Rev. Murphy Davis. The court noted:

> The testimony shows that Reverend Davis is an ordained Presbyterian minister and Director of the Southern Prison Ministry of Georgia. She is philosophically opposed to capital punishment. Reverend Davis has had some personal contact with [the defendant] over approximately one and a half years and has counseled with him on occasion. The evidence does not demonstrate that she is in any way his personal minister or religious adviser.

Id. The court held, "Although the court has no doubt as to the deep sincerity of Reverend Davis' convictions, her connection with [the defendant] is that of a concerned minister who has made herself available to assist him. Such a relationship is insufficient to confer upon her status as 'next friend.'" *Id.* at 275-76. The court then went on to quote Justice Rehnquist's concern expressed in an opinion written in the capacity of Circuit Justice:

> "[H]owever worthy and high minded the motives of 'next friends' may be, they inevitably run the risk of making the actual defendant a pawn to be manipulated on a chessboard larger than his own case." *Lenhard v. Wolff*, 443 U.S. 1306, 1312, *stay of execution denied*, 444 U.S. 807 (1979), *quoted in Davis*, 492 F. Supp. at 276.

Rev. Franz's connection to Simmons is even more tenuous than the one in *Davis*. According to his petition, Rev. Franz is a Catholic priest who counsels inmates at the Arkansas Department of Correction. There is nothing in his petition to indicate that he is Simmons's spiritual adviser, or confidant, or even less, that the two have ever met. We hold that Rev. Franz has failed to allege any facts to show that his relationship to Simmons is sufficiently close to give rise to next friend status, and we therefore cannot grant him standing on this basis.

Rev. Franz alternatively argues that even if he does not have standing as next friend, he has standing as a taxpayer under article 16, section 13 of the Constitution of Arkansas, the illegal exaction provision. The argument is without merit for at least two reasons. First, a suit to prevent an illegal exaction must be commenced in a trial court. Such a suit cannot be commenced in this appellate court. Second, the constitutional provision is not so broad that it gives one taxpayer the right to intervene in the merits of a criminal case against another person.

Rev. Franz's last alternative argument is that if he is not granted standing in this case then important legal issues will go unresolved at the appellate level. Even though this is true, it is not sufficient to give petitioner standing. In *Gilmore v. Utah*, 429 U.S. 1012 (1976), the

Supreme Court of the United States terminated Gary Gilmore's stay of execution at his request. At the time, the constitutionality of the Utah death penalty statute had not been reviewed by either the Utah Supreme Court or the Supreme Court of the United States. Justice White noted in his dissent (which was joined by Justices Brennan and Marshall) that "there are substantial questions under *Furman v. Georgia*, 408 U.S. 238 (1972), about the constitutionality of the Utah death penalty statute. Because of Gary Gilmore's purported waiver of his right to challenge the statute, none of these questions was resolved in the Utah courts." *Gilmore*, 429 U.S. at 1017-18 (White, J., dissenting). Justice Blackmun also noted that the constitutional question was "not insubstantial." *Id.* at 1020 (Blackmun, J., dissenting). Chief Justice Burger (joined by Justice Powell) was unconcerned, noting, "Gilmore has not challenged the validity of the statute under which he was convicted, and there is no other party before this Court with requisite standing to do so." *Id.* at 1017 n.7 (Burger, C.J., concurring). The existence of the question was not sufficient to give a third person standing, and, therefore, the question went unresolved at the appellate level. Accordingly, we reject Rev. Franz's attempt to gain standing simply because of the existence of important legal issues which remain unresolved at the appellate level.

2. Mandatory Review

However, as has often been noted, "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). Because of the punishment's uniqueness and irreversibility, we choose to state

clearly the law in Arkansas regarding the waiver of appeal in death cases.

The threshhold [sic] question is whether an appeal is mandatory in cases involving a death sentence. We have said that it is not: "[T]here is no mandatory appellate review in Arkansas." *Collins v. State*, 261 Ark. 195, 211, 548 S.W.2d 106, 115, *cert. denied*, 434 U.S. 878 (1977).

The next question is whether the lack of mandatory appeal renders our law unconstitutional. We have held that it does not:

> It is urged, however, that our system does not meet *Gregg-Proffit*[sic]-*Jurek* standards necessary to avoid Eighth and Fourteenth Amendment prohibitions for lack of a mandatory appeal of a judgment imposing the death penalty and of appellate review which compares cases in which the death penalty has been imposed. [This is a reference to the standards set out in *Gregg v. Georgia*, 428 U.S. 153 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976).]
>
> We find nothing in any opinion, and certainly no majority, which supports a holding that there *must* be either a mandatory or automatic appeal of a judgment imposing the death penalty or that there *must* be appellate review which compares cases in which the death penalty has been imposed. . . .
>
> . . . It seems to us that the only actual requirement, even of the Stewart plurality, is that a *meaningful* appellate review is available to insure that death penalties are not arbitrarily, capriciously or freakishly imposed. The important question is whether the system creates a substantial risk of arbitrariness or caprice.

. . . .

> The idea that in *Gregg, Proffitt, and Jurek*, the United States Supreme Court has held that there must be a mandatory or automatic appeal from the imposition of the death penalty by a state trial court seems to have crumbled with the recent actions of the court in *Gilmore v. State of Utah*, 429 U.S. 1012, 97 S. Ct. 436, 50 L. Ed. 2d 632 (1976) . . . . If the Constitution of the United States requires that a state provide a mandatory appeal in such cases, we do not see how there can be a knowing and intelligent waiver of "any and all federal rights" [as was found in *Gilmore*] when there has been no appeal from the state trial court's judgment imposing the death sentence. [Gilmore, too, had waived his right of appeal under state law.]

Collins, 261 Ark. at 204-06, 548 S.W.2d at 111-12.

To support his contention that appeals in death penalty cases are mandatory, the petitioner cites Ark. Code Ann. § 16-91-113(a) (1987) and Ark. R. Crim. P. 36.24. The statute provides, "The Supreme Court need only review those matters briefed and argued by the appellant, except that, where either a sentence for life imprisonment or death has been imposed, the Supreme Court shall review all errors prejudicial to the rights of the appellant." Rule 36.24 contains almost identical language. These provisions, along with Ark. R. Sup. Ct. 11(f), simply mean that this Court must make its own examination of the record when an appeal is taken in such cases; they do not mandate an appeal.

3. Waiver

We note, however, that when a defendant sentenced to death declines to exercise his unqualified right to appeal, we will not automatically acquiesce to his desire.

In *Collins*, we noted that "[t]he likelihood that a death penalty would be executed without such an appeal, in the absence of a knowing and intelligent waiver, is highly improbable." *Id.* at 211, 548 S.W.2d at 115. This language recently served as the basis for our decision in *Rameta v. State*, 294 Ark. 206, 740 S.W.2d 928 (1987) (per curiam). In Rameta, the defendant had been sentenced to death and wished to be executed. He petitioned us to dismiss his appeal. Relying on *Collins*, we held that such a defendant will not be allowed to forego an appeal unless the trial court, in its discretion, has determined that the defendant's decision has been knowingly and intelligently made. However, we left two questions unanswered in *Rameta*.

The first question involves what standard is to be used by a trial court in determining whether a decision to waive appeal is knowing and intelligent. The federal standard seems to be "roughly equivalent to the standard used to determine competency to stand trial: the defendant will be competent unless he lacks sufficient 'capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation.'" White, *Defendants Who Elect Execution*, 48 U. Pitt. L. Rev. 853, 863 (1987) (quoting *Rees v. Peyton*, 384 U.S. 312, 314 (1966) (per curiam)). This standard has been widely criticized. *See, e.g.*, Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. Crim. L. & Criminology 860 (1983); White, *supra*. We feel that Professor Welsh White correctly summarized the problem with the standard:

The issue of competency is troubling. The present standard for competency to elect execution is roughly equivalent to the test for competency to stand trial. But the decisions involved in the two situations are entirely different. When competency to stand trial is at issue, the court is required to determine whether the defendant understands the charges against him and has the capacity to communicate effectively with his attorney. When competency to elect execution is involved, the issue is whether the defendant has the capacity to choose between life and death. The focus should be upon not only the defendant's ability to understand the basic issue but also upon his ability to resolve it knowingly and voluntarily. Defense attorneys who specialize in capital cases claim that many capital defendants who have an adequate understanding of the charges against them and are fully competent to communicate with counsel should nevertheless be barred from electing execution because they lack either the judgment or the emotional stability to make a firm and stable decision, much less an informed one.

White, *supra*, at 867 (footnotes omitted). We adopt this higher criterion for declining to exercise the right to appeal in a capital case. Therefore, in Arkansas, a defendant sentenced to death will be able to forego a state appeal only if he has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence.

The second question unanswered by *Rameta* is whether this Court must review a lower court's determination on the issue of the waiver of an appeal in a capital case. We hold that we must. In future cases, when

a lower court has made a determination that a capital defendant can make a knowing and intelligent waiver of appeal, and has done so, the State has the burden of bringing the record of the lower court proceeding on this issue to this Court for review. The record on this issue should, if possible, be lodged in this Court after the time for appeal has lapsed, but, in any event, it must be lodged at least seven days before the execution date. We will then review the proceeding to determine whether the defendant had the capacity to understand the choice between life and death and to knowingly and intelligently waive his rights to appeal his sentence of death. The standard of review, as in other types of criminal cases, is whether the trial judge's conclusion is clearly erroneous. *See Rector v. State*, 277 Ark. 17, 638 S.W.2d 672 (1982).

In this case the trial judge found that the defendant made a rational choice and knowingly and intelligently waived his right to an appeal. That finding is not clearly erroneous.

Not only has the defendant failed to exercise his unqualified right to appeal, but, in addition, after being sentenced, affirmatively stated:

> [I]t is my wish and my desire that absolutely no action by anybody be taken to appeal or in any way change this sentence.
>
> It is further respectfully requested that this sentence be carried out expeditiously. I want no action that will delay, deny, defer or denounce this very correct and proper death sentence.
>
> My attorneys have repeatedly counseled me to appeal. However, that is not what I want. I

believe now, and always have, in the death penalty. To those who oppose the death penalty, I say in my particular case anything short of death would be cruel and unusual punishment.

I am of sound mind and body and have been seen by psychoanalysts, who can verify that I am capable of making a clear and rational decision. I have given clear and careful thought and consideration so there is nothing that will cause me to change my mind. I only ask for what I deserve. Let the torture and suffering end. Please allow me the right to be at peace.

At the same time his attorneys gave an affidavit in which they said he is "sane, rational, responsible and able to make his own decisions."

At a subsequent hearing on his competency to waive appeal, Dr. Lew Neal, a highly qualified psychiatrist hired by the defense attorneys, testified and gave an affidavit which together unequivocally state that Simmons understands the consequences of his choice, is capable of making a rational decision, and is doing so freely and voluntarily.

Dr. Irving Kuo, a pyschiatrist [sic] with the State Hospital, which is an agency independent of the prosecutor, see *Parker v. State*, 292 Ark. 421, 433, 731 S.W.2d 756, 762 (1987), examined Simmons during a sixty day evaluation before the trial and examined him for an hour and a half after the trial. He testified that Simmons understands the consequences of his choice and has made his choice knowingly. The key questions by the trial court and the decisive answers by Dr. Kuo are as follows:

Q. Of course, the conclusion that the Court has to reach today is not necesssarily [sic] whether

the Defendant appreciated the criminality of his conduct or that he was able to assist his attorneys. What I am required to do now is make a decision as to whether he can knowingly and intelligently waive his right to appeal his conviction. Do you have an opinion along those lines?

A. Yes, I do.

Q. Have you discussed this with Mr. Simmons?

A. Yes, I have.

Q. Do you feel that he is capable of making a decision that is knowingly and intelligently arrived at?

A. Yes, I do.

Q. What is the basis of your opinion?

A. Okay. During the hour and a half that I spoke with him I tried to retrace a little bit of history since the last time I saw him; and basically I conducted an interview for about ninety minutes and touched on a number of topics, including one about the sentencing and his desire to waive the –

Q. The appeal process?

A. –waive the appeal process; and in the course of that, I tried to get a feel of how he was today. I did what we call a mental status examination, which basically is a snapshot of – which basically is a snapshot of his psychiatric or mental condition right at the time that I interviewed him. My assessment was that he looked very much like he did during the two months that I had seen him earlier this year. There was no evidence of any psychotic process. His thinking was goal-directed, was relevant, logical. He seemed able to make an intelligent decision that

was not interfered by – that didn't have any interference by any kind of psychiatric problem that I could detect.

Q. Do you feel that Mr. Simmons is under any pressure or anything that's causing him to take this position?

A. Well, I think that Mr. Simmons has some internal pressure in terms of wanting to waive the particular appeal process. I don't think there is any external pressure from any outside source. I think that in spite of the conviction he comes across as an extremely moralistic very rigid gentleman who has some real rigid ideas about right and wrong and his own statement was that the punishment needs to fit the crime and he felt that this was, you know, an appropriate and proper decision, the one that came down on Thursday; and he seemed to think that it was quite proper. He seemed to indicate that he knew what he did. He indicated that it was in a somewhat premeditated fashion and that he felt that the punishment should fit the crime. He told me that he does believe in capital punishment.

At the conclusion of this hearing the trial court found that Simmons was competent to waive his right to an appeal.

One month later a competency hearing was held at the request of the petitioner, Rev. Franz. At that hearing the state hospital psychiatrist, Dr. Kuo, modified his opinion.

Dr. Kuo stated that his modified opinion came about as follows: He wrote to the defendant and said he would

like to have another interview in order to obtain information for publication in a professional journal. The defendant responded and in the first sentence of the fifth paragraph wrote: "Evidence is beginning to surface to indicate that officials are starting to play their little games." Dr. Kuo testified that one sentence "can hint towards" psychosis and therefore he had "some doubt" as to whether that opinion [his original opinion] was correct. At another time he said he had a "doubt," not just "some doubt," about his original opinion.

Dr. Kuo testified that his original opinion was given after sixty days of personal observation, not only by himself but by an evaluation team. He admitted that he had not talked to the defendant since his first opinion and admitted that no other member of the evaluation team was present to testify as to any doubt. Significantly, the petitioner did not attempt to call the defendant's own psychiatrist.

Simmons took the stand and testified that he did not want Rev. Franz or anyone else to serve as his next friend.

The trial court again found Simmons competent to waive his right to appeal. The ruling is not clearly erroneous.

The trial court was in a position to observe the testimony of Dr. Kuo and the defendant. The Supreme Court of the United States has stated:

> *In United States v. Oregon Medical Society*, 343 U.S. 169 (1952), commenting on the deference which this Court gave to the findings of a District Court on direct appeal from a judgment in a bench trial, we stated:

> "As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' *Boyd v. Boyd*, 252 N.Y. 422, 429, 169 N.E. 632, 634." *Id.*, at 339.

Marshall v. Lonberger, 434 U.S. 422, 434 (1983).

Dr. Kuo did not retract his statement that the defendant was competent; he only stated that he had doubts about his original opinion. His original opinion was given based upon sixty days observation coupled with an hour and a half interview at the time of the first opinion. The doubt about that opinion was not created by a first-hand interview but by one sentence in a full-page letter. No other member of the evaluation team testified. Neither Dr. Neal, the defendant's psychiatrist, nor the defense attorneys have retracted in any manner their statements that Simmons is competent to waive his right to appeal. Accordingly, we affirm the trial court's ruling that the defendant is competent to waive his unqualified right to appeal.

We hold that Rev. Franz does not have standing and that the defendant understands the choice of life and death and has made a knowing and intelligent waiver of

his right to appeal. Accordingly, the stay of execution which we granted on June 20, 1988, is hereby terminated. Since Rev. Franz does not have standing, he does not have standing to file a petition for rehearing. Therefore, the mandate is ordered to be issued at the time this opinion is handed down.

Hays, J., dissents.

Glaze, J., concurs in part and dissents in part.

TOM GLAZE, Associate Justice, Concurring and Dissenting Opinion

I agree with the majority that Reverend Louis J. Franz has no standing to pursue an appeal in behalf of Ronald Gene Simmons. While this court is confronted for the first time with the standing and competency issues in a death penalty situation, those issues have been considered and decided in numerous cases in other jurisdictions. *See Smith, Mo. Public Defender Comm'n. v. Armontrout*, 812 F.2d 1050 (8th Cir. 1987); *Lovelace v. Lynaugh*, 809 F.2d 1136 (5th Cir. 1987); *Rumbaugh v. McKaskle*, 730 F.2d 291 (5th Cir. 1984); *Hays v. Murphy*, 663 F.2d 1004 (10th Cir. 1981); *Davis v. Austin*, 492 F. Supp. 273 (N.D. Ga. 1980); *State v. Hightower*, 214 N.J. Super. 43, 518 A.2d 482 (1986); and *State v. Bailey*, 519 A.2d 132 (Del. Super. Ct. 1986). All of the foregoing decisions cite *Gilmore v. Utah*, 429 U.S. 1012 (1976), and in relying on *Gilmore*, those courts have either generally, or specifically adhered to the proposition that a defendant who has been sentenced to death can make a competent, knowing and intelligent choice to abandon

further litigation, and when that choice is made, it will be honored by the courts. In each of the cases set out above, the court, quoting from *Rees v. Peyton*, 384 U.S. 312 (1966), posed the critical issue as follows: "Whether the defendant has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." If the defendant is determined to be competent, then a next friend has no standing to pursue further proceedings when the defendant chooses not to proceed.

In the present case, the trial judge held hearings to determine Simmons's competency, and after analyzing considerable evidence and testimony, the judge found Simmons had the capacity to waive his right to an appeal. It is this court's duty to review the lower court's findings under the clearly erroneous standard. *Cf. Smith, Mo. Public Defender Comm'n*, 812 F.2d at 1058. The majority opinion details much of the testimony taken during the hearings bearing on the competency issue, and I thoroughly agree with the finding that the trial judge's decision is not clearly erroneous.

In reaching its decision, the majority concludes that this court must review a lower court's determination on the issue of the waiver of an appeal in a capital case. While the court gives no basis for its holding, I have no doubt that such a decision is required by the Supreme Court's holding in *Gilmore*. It is really unimportant why the majority has decided that an appellate review is necessary in order to examine the waiver issue in capital cases, but once the majority did so, I believe it should

have expanded such a review to include the sentencing stage of a defendant's trial. My reasons for suggesting such a review are several.

First, the Supreme Court has not yet decided the issue as to whether a defendant has the power to waive the right to a state appellate review. *Gilmore*, 429 U.S. at 1017 (Burger, C.J., concurring). Instead, the Supreme Court in *Gilmore* merely reviewed the record bearing on Gilmore's competency and decided his mother did not have standing to speak for him. I believe the Supreme Court's holding implicitly requires that an appellate review be given in such competency matters. However, little more can be gleaned from the *Gilmore* decision. As a consequence, the Supreme Court – as well as this court – must still decide whether appellate reviews are mandated in capital cases. This court in *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977), discussed this very issue and by a four-to-three vote, the majority concluded that a mandatory or automatic appeal of a judgment imposing the death penalty is not required. Justice George Rose Smith wrote a persuasive dissenting opinion asserting that a mandatory review should be provided. Nothing more on the subject has been done by either this court or the General Assembly, and the Supreme Court has not reached or conclusively decided whether such appeals are mandated by the Constitution.

In addition to the fact that a substantial constitutional question still remains unresolved concerning the question of mandatory review, Arkansas, and perhaps Ohio, are the only states that have no specific provisions for an automatic review of capital cases. *See* U.S. Dept. of

Justice, Bureau of Justice Statistics, Bull., *Capital Punishment, 1986* (Sept. 1987).[1] Although Ohio has been noted as a state that does not provide for an automatic review, the case of *State v. Brooks*, 25 Ohio St. 3d 144, 495 N.E.2d 407 (1986), lends some argument to the contrary. While such issue was not specifically addressed in *Brooks*, it is important to note that Brooks's motion to withdraw his appeal of the death sentence was denied by the Ohio appellate court even though the record reflected Brooks was competent to stand trial.[2] After denying Brooks's motion, the Ohio Court of Appeals, and later the Ohio Supreme Court, reviewed Brooks's death sentence in detail, concluding that the sentence was proper. In sum, out of the thirty-seven states that provide for the death penalty, thirty-five of them require an automatic review. As pointed out, the Ohio courts, representative of one of the two states that have no automatic review requirement, have failed to address the issue directly, but instead opted to review a capital case even after the defendant (who was found competent to stand trial) sought to abandon his right of appeal. Thus, by the majority's opinion Arkansas becomes the only state that actually has chosen not to review a death penalty case.

Another reason for requiring reviews in death penalty situations is reflected in this state's present laws.

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[1] This Bulletin recites Arkansas, Florida, Ohio and Vermont have no such provisions but both Florida and Vermont have since amended their laws to provide mandatory reviews.

[2] Apparently the Ohio courts never required a hearing (or found one was necessary) to determine whether Brooks was competent to waive his right of appeal.

Arkansas's laws clearly provide that great scrutiny be given death penalty cases before a defendant is executed. For example, in capital felony murder cases, a separate phase of the trial is required for sentencing, at which evidence relating to aggravating or mitigating circumstances may be presented to the same jury that found the defendant guilty of the crime. Ark. Code Ann. § 5-4-602 (1987). The jury is authorized to impose the death sentence only if it unanimously returns written findings that the aggravating circumstances exist beyond a reasonable doubt, that the aggravating circumstances outweigh all mitigating circumstances, and that the aggravating circumstances justify a sentence of death beyond a reasonable doubt. Ark. Code Ann. § 5-4-603 (1987). Also, this court has held that the review of capital cases with death sentences requires the court to consult prior cases as precedent in order to determine whether there was error in the sentencing procedure, whether the evidence was sufficient to support any finding made by the jury, whether any of the findings were the result of passion or prejudice or other arbitrary factors and whether there was an abuse of discretion of either the jury or the trial judge in imposing sentence. *Collins*, 261 Ark. at 221, 548 S.W.2d at 212. Furthermore, this court is mandated under A.R.Cr.P. Rule 36.24 and Ark. Sup. Ct. R. 11(f) to review the entire record for errors prejudicial to the right of the appellant. Obviously, without mandatory appellate review, none of the foregoing legal requirements can be measured when a defendant chooses to waive his right to appeal – which leads me to the final reason why I believe the appellate review of a defendant's sentence should be required.

In my view, no criminal defendant, including Simmons in this cause, should dictate this state's policy concerning whether death sentences should be reviewed. The question posed in these cases in no way involves the constitutionality of the death penalty itself. The courts are, however, confronted with the various constitutional and statutory requirements needed to be complied with when imposing the death penalty.

In a number of cases cited earlier in this opinion, the criminal defendants often changed their minds during their trials or appeals as to whether they desired to abandon or continue their rights of appeal. Obviously, such changes in attitude can be expected, but those changes also lead to extensions and delays in the judicial process. This court can avoid such delays by taking charge of this state's appellate process and requiring that in every capital case where the death penalty has been imposed, the court will automatically review the lower court's record of the *sentencing phase* of the trial.

The majority has – as I believe *Gilmore* requires – provided for review of any competency hearing required when a defendant chooses to waive his or her right of appeal. In the present case, a little more than two months have transpired between Simmons's competency hearing and this court's final review of that hearing. In my estimation, no delay would have been added if this court had reviewed the sentencing stage of Simmons's trial. By adopting such a review procedure, the court would allow any defendant to waive his right of appeal concerning his guilt, but at the same time, the state's highest court would provide a prompt review concerning whether the death penalty was constitutionally and appropriately

imposed. This would ensure the scrutiny of death penalty cases that our law mandates.

Because Arkansas's present procedure is, in my view, constitutionally suspect, this court could avoid those constitutional questions and potential pitfalls by reviewing the sentence phase of death penalty cases. Such a review would, at the same time, provide a more expeditious manner by which such capital cases may be disposed. Certainly, such a review procedure would place the process of review of capital cases in the control of the state's judiciary, as it should be, rather than at the impulse or whim of a defendant.

STEELE HAYS, Associate Justice (Dissenting Opinion)

While I concur in the majority view that the Reverend Louis J. Franz lacks standing to act as next friend for Ronald Gene Simmons, I would adopt a rule for mandatory appellate review and apply it to this case.

I concede there is no express provision in our law for mandatory appeal, but it is at least arguable that our law now implicitly provides for mandatory review by this court in cases in which a sentence of death is imposed. While dictum to the contrary appears in *Collins v. State*, 261 Ark. 195, 211, 548 S.W.2d 106 (1977), that was not the holding and certainly does not prevent our adopting a rule for mandatory review in death cases. Moreover, in *Collins* this court committed itself to a proportional review where death is imposed on the defendant. Our Rule 11(f), adopted pursuant to Act 333 of 1971, states

that "when the sentence is death or life imprisonment, the court *must* review all errors prejudicial to the appellant." (My emphasis). Additionally, in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980), we said that in a capital case if the trial court fails to instruct the jury that it has the option of returning a lesser penalty than death, that is reversible even in the absence of an objection. Keeping faith with *Wicks*, *Collins*, and Rule 11(f), mandates, I submit, appellate review of the entire record in death cases.

But whether the law now provides for mandatory appeal is beside the point, as it is plainly within the rule making power of this court to effectuate such a rule to operate immediately. If we can change our rule in a civil case to affect pending litigation, as we did in *Ford Motor Credit Co. v. Nesheim*, 287 Ark. 78, 696 S.W.2d 732 (1986),[1] we can certainly do so where the death sentence is involved.

The adoption of such a rule, as I envision it, simply means that, notwithstanding a waiver of appeal by the defendant, this court, on information from either the Attorney General or the trial court, that a death sentence has been imposed, would issue a writ of certiorari for the record and appoint counsel to argue any errors prejudicial to the defendant. The unique severity of the death sentence and the public interest in its imposition demand nothing less.

---

[1] On March 18, 1985, we amended Rule 2(a)(9) of the Rules of Appellate Procedure to permit an appeal by *Ford Motor Credit Co.* from an order of the trial court certifying the case as a class action.

The public's interest and right to having a review of a death sentence is discussed in Kaine, *Capital Punishment and the Waiver of Sentence Review*, 18 Harv. C.R.-C.L. L. Rev. 483 (1983)(footnotes omitted):

> the societal interest in ensuring that capital punishment is fairly imposed is too great to allow execution without the appellate scrutiny required by the eighth amendment. . . .
>
> It is also inappropriate to grant complete power to a defendant's waiver when that choice will infringe upon the constitutional rights of other citizens. The [Supreme] Court recognized this limitation on waiver in *Richmond Newspapers v. Virginia*, by holding that the first amendment rights of reporters and others to be present at a criminal trial outweighed a defendant's waiver of a public trial. Similarly, an attempt to force execution by the state prior to the resolution of inquiries required by the Constitution violates that document's protection of the public from abuse of state power.
>
> Finally, statutory and judicial restrictions upon the ability of a capital defendant to decide whether to be present at trial or to pursue review of a sentence – decisions not generally based on specific constitutional protections – reflect the understanding that the death penalty is a matter of public as well as individual concern.

I do not question the right of a competent defendant to refrain from participating in an appeal, or to deny others the right to act in his behalf. But that right does not empower a defendant to by-pass appellate review any more than he could bypass a trial or, if a plea of guilty is entered, a hearing on the guilty plea. These steps are basic, and where the sentence is death, appellate review

is equally basic. By rejecting the opportunity to adopt a rule of mandatory review the majority has put Arkansas at odds with all but one of the thirty-seven states which have the death penalty, not an enviable position, and not one likely to endure.

SUPREME COURT OF ARKANSAS

No. CR89-45

RONALD GENE SIMMONS PETITIONER, V. STATE OF ARKANSAS, RESPONDENT.	MAR 10 1989 PETITION REQUESTING EXPEDITED REVIEW OF WAIVER OF DIRECT APPEAL IN A CAPITAL MURDER CASE IN WHICH THE DEATH PENALTY WAS IMPOSED PETITION GRANTED

Per Curiam

The petitioner, Ronald Gene Simmons, has filed his petition requesting expedited review of his waiver of direct appeal. On February 10, 1989, a Johnson County jury convicted the petitioner of capital murder and sentenced him to death by lethal injection, on March 16, 1989, at 7:00 o'clock a.m. Following the trial, the petitioner notified the trial judge of his desire to waive his appeal and after an evidentiary hearing held on March 1, 1989, the trial judge found that the petitioner was competent to waive his right to a direct appeal. In accordance with this court's decision in *Franz v. State,* 296 Ark. 181, 754 S.W.2d 839 (1988), petitioner now submits to this court a transcript of the lower court's proceedings along with his petition, and requests we review those proceedings in accordance with the rule established in the *Franz* case. After careful review of those lower court proceedings, we grant petitioner's request.

In *Franz*, we held that when a defendant sentenced to death declines to excerise his unqualified right to appeal, we will not automatically acquiesce to his desire. We stated that a defendant sentenced to death will be able to forego an appeal only if he has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence. This court further held that we must review a lower court's determination on the issue of the waiver of an appeal in a capital case, and that the state has the burden of bringing the lower court's record on this issue to this court for review. We added that the record must be lodged at least seven days before the execution date. All of these requirements have been met.

In sum, we would note that the trial court considered, and made a part of this proceeding, the same psychological evaluations that were introduced in *Franz*. Since those evaluations were alluded to in detail there, we need not reiterate those findings in this opinion. In addition, the trial court added to the record before us a forensic evaluation which was filed in a proceeding before the United States District Court, Eastern District of Arkansas. The federal court proceeding concerned the issue of whether Mr. Simmons was presently competent to waive habeas corpus relief. From our review of this recent forensic evaluation, we find nothing that diminishes in any way the earlier psychological evaluations submitted in the state proceedings.

The trial judge and petitioner's counsel performed an exceptional job in examining and exploring the petitioner's capacity to understand the choice between life

and death and his ability to know and to intelligently waive any and all rights he might have in an appeal of his sentence. In addition, petitioner's counsel thoroughly discussed seven possible points that could be argued for reversal on appeal, and petitioner responded by stating he understood those points and that he rejected all encouragement and suggestions to appeal. Petitioner further acknowledged that the execution date was set for March 16, 1989, and that he had thirty days in which to appeal his conviction judgment.

After a careful review of the record and exhibits, we affirm the trial court's decision that the petitioner has knowingly and intelligently waived his right to appeal. Accordingly, we direct that this court's mandate be issued at the time this opinion is handed down.

HAYS, dissents for the reasons stated in *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988).

THIS IS A CAPITAL CASE AND
EXECUTION DATE IS IMMINENT

IN THE SUPREME COURT OF ARKANSAS

JONAS H. WHITMORE
INDIVIDUALLY AND
AS NEXT FRIEND OF
RONALD GENE SIMMONS — PETITIONERS

VS NO. CR 89-45

STATE OF ARKANSAS — RESPONDENT

MOTION TO INTERVENE AND
FOR STAY OF EXECUTION

FILED MAR 13 1989

Comes Jonas H. Whitmore individually and as next friend of Ronald Gene Simmons and for his Motion To Intervene And For Stay of Execution, states:

1. Ronald Gene Simmons is an inmate on Arkansas death row whose execution is scheduled for March 16, 1989.

2. Jonas H. Whitmore is an inmate on Arkansas death row who is seeking permission to intervene as next friend of Ronald Gene Simmons.

3. There are important constitutional issues including the requirement of a constitutionally mandated appellate review in any capital case and Petitioner Whitmore intends to seek a writ of certiorari to the United States Supreme Court to review this question.

4. The execution date of Ronald Gene Simmons is so imminent that unless a stay of execution is granted by this Court, the important constitutional issues cannot be addressed through further legal action.

5. The Petitioner Jonas H. Whitmore is an interested party in that certain protected rights for both he and other present and future death row inmates are dependent upon further appellate review in behalf of Ronald Gene Simmons.

WHEREFORE, Jonas H. Whitmore acting individually and as next friend for Ronald Gene Simmons respectfully prays that he be allowed to intervene in this case for the purpose of seeking a writ of certiorari in the United States Supreme Court and that this Court grant a stay of execution of the March 16, 1989 execution date for Ronald Gene Simmons.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Arthur L. Allen, do hereby certify that a true and correct copy of the foregoing application was served by hand delivery upon the Hon. Steve Clark, Attorney General of Arkansas, 200 Tower Building, Little Rock, Arkansas 72201, on this 13th day of March, 1989.

/s/ Arthur L. Allen
Arthur L. Allen

SUPREME COURT OF ARKANSAS

No. CR89-45

RONALD GENE SIMMONS PETITIONER, V. STATE OF ARKANSAS, RESPONDENT.	) MAR 13 1989)) MOTION TO INTERVENE AND FOR STAY OF EXECUTION))) MOTION DENIED)	

Per Curiam

Petitioner has failed to show that he has standing to intervene in this cause. *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988).

SUPREME COURT OF THE UNITED STATES

No. 88-7146

Jonas H. Whitmore, individually and as next friend of Ronald Gene Simmons,

Petitioner

v.

Arkansas, et al.

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Arkansas.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

July 3, 1989

(6)

Supreme Court, U.S.
FILED
AUG 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-7146

In The

Supreme Court of the United States

October Term, 1989

JONAS H. WHITMORE, INDIVIDUALLY
AND AS NEXT FRIEND OF RONALD GENE SIMMONS

Petitioner,

vs.

ARKANSAS, et al.

Respondents.

On Writ of Certiorari
to the Supreme Court of Arkansas

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the Eighth Amendment's ban against cruel and unusual punishment requires a mandatory appellate review in all cases in which the death penalty is imposed?

2. Whether a third-party has standing to assert the violation of constitutional rights when the party directly effected does not assert the right?

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OPINIONS BELOW

The opinion of the Arkansas Supreme Court in *Franz v. State* (Simmons I), reported at 296 Ark. 181, 754 S.W.2d 839 (1988), is reprinted in the Joint Appendix at 4.

The opinion of the Arkansas Supreme Court in *Simmons v. State* (Simmons II), reported at 298 Ark. 193, 766 S.W.2d 422 (1989), reprinted in the Joint Appendix at 29.

The opinion of the Arkansas Supreme Court in *Simmons v. State* (Simmons II), reported at 298 Ark. 255, 766 S.W.2d 423 (1989), is reprinted in the Joint Appendix at 34.

JURISDICTION

The Arkansas Supreme Court issued its opinion on March 10, 1989, finding that Ronald Gene Simmons could waive his right to appeal and proceed to execution on March 16, 1989. On March 13, 1989, the Arkansas Supreme Court issued its opinion denying Jonas Whitmore the right to intervene in behalf of Ronald Gene Simmons. Jonas Whitmore filed his petition seeking a writ of certiorari on May 3, 1989. This Court has discretionary jurisdiction to review the above two decisions of the Arkansas Supreme Court under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property without due process of law. . . .

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

On March 16, 1989, the State of Arkansas was prepared to execute Ronald Gene Simmons for the crime of capital murder. His trial had occurred in February of 1989 and he chose to waive his right to appellate review of the conviction and sentence imposed. No transcript of his trial was prepared and no appellate court reviewed the record to determine whether reversible error had occurred, whether his retained counsel had rendered effective assistance (those counsel advocating then and now the execution of Ronald Gene Simmons), or whether the penalty was arbitrarily and capriciously imposed.

Simmons had previously been convicted of capital murder in May of 1988 and had elected at that time to oppose any attempt to appeal his conviction. *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988). (Joint Appendix at 4.

Following the first conviction of Simmons (Simmons I for clarity), Fr. Louis Franz, a catholic priest who counsels Arkansas death row inmates, filed a petition with the Arkansas Supreme Court asking to be allowed to proceed as "next-friend" of Simmons to have the Court determine that an appellate review was mandatory in death penalty cases. *Franz v. State*, 296 Ark. 181, 183, 754 S.W.2d 839, 840 (1988).

After receiving briefs from the parties, the Arkansas Supreme Court ruled that "there is no mandatory appellate review in Arkansas", *Franz, id.* at 186, 754 S.W.2d at 842 and that the absence of a mandatory appeal did not render the Arkansas death penalty statute unconstitutional. *Franz, id.* at 186-188, 754 S.W.2d at 842-843.

The Arkansas Supreme Court fashioned a rule in Simmons I which required the trial court to conduct a hearing as to the defendant's competency to waive appellate review (a standard similar to that set forth in *Rees v. Peyton*, 384 U.S. 312 (1966), which equates to the test for competency to stand trial). *Franz, id.* at 188-189, 754 S.W.2d at 843. Finding Simmons competent under this test, a mandate issued and Simmons had an execution date set. A federal habeas corpus action was filed (*Franz v. Lockhart*) and Simmons I is currently on appeal to the United States Court of Appeals for the Eighth Circuit following a ruling by the United States District Court that Fr. Franz lacked standing to proceed as "next-friend". *Franz v. Lockhart*, 700 F.Supp. 1005 (E.D. Ark. 1988).

In accordance with its earlier holding in Simmons I (*Franz v. State*, 296 Ark. 181 (1988)), the Arkansas Supreme Court accepted Simmons' waiver of his right to

appeal in his second conviction (Simmons II, the instant case), *Simmons v. State*, 298 Ark. 193, 766 S.W.2d 422 (1989) (J.A. at 29) and denied the motion of Jonas H. Whitmore to proceed as "next-friend" of Simmons. *Simmons v. State*, 298 Ark. 255, 766 S.W.2d 423 (1989). (J.A. at 34)

On March 15, 1989, this Court granted a stay of execution pending the filing of a petition for certiorari and the petition was granted on July 3, 1989.

SUMMARY OF THE ARGUMENT

Prior decisions of this Court have implicity found that a mandatory appellate review of death penalty cases is necessary to insure that such sentences are not arbitrarily or capriciously imposed, *Gregg v. Georgia*, 428 U.S. 153 (1976). These holdings have been predicated upon the fact that "death differs from all other forms of punishment", *Furman v. Georgia*, 408 U.S. 241 (1972) and that "careful scrutiny", *Zant v. Stephens*, 462 U.S. 862 (1982), must be made of the imposition of such penalty.

Arkansas is the only state with a death penalty statute which does not, by statute or caselaw require a mandatory appellate review of cases in which the death penalty is imposed. Because the protections of the Eighth Amendment are not static, but instead reflect society's "evolving standards of decency", *Trop v. Dulles*, 356 U.S. 86 (1958), the system in use in Arkansas is constitutionally defective in that it has not kept apace of those maturing standards.

Appellate review of death penalty cases serves as an important check against the arbitrary and capricious imposition of the sentence in both Arkansas and other states having this sanction. The Arkansas Supreme Court, by available figures, has reversed or reduced the sentence in over 40% of the capital cases reviewed during a recent six year period and this important safeguard should not be bypassed upon the whim or caprice of the individual defendant. Without such review, a substantial risk exists that both the innocent and the illegally convicted could be executed and this would be intolerable for an irrevocable penalty.

The right to "waive" a constitutional protection is not absolute, *Singer v. United States*, 380 U.S. 24 (1965), and the waiver of appellate review in a capital case is contrary to public policy in that society has a more compelling right to insist that this most severe penalty is imposed only on those eligible and deserving of it. The police power of the State requires it to override individual desires when the greater needs of its citizens are endangered.

The Petitioner Jonas H. Whitmore has standing to assert this violation of a constitutional right as it directly involves his right as a citizen of the state to the public interest rights conferred under the Eighth Amendment to protect society from having cruel and unusual punishment imposed in its name. He also has standing because he is subject to the "comparative review" afforded in capital cases by the Arkansas Supreme Court which would be rendered meaningless without a complete data base. Alternatively, because of the important societal interest involved in the imposition of the death penalty

and because the violation would otherwise be without a remedy, the stricter standards of "standing" should be relaxed in this instance.

ARGUMENT

I. The Eighth Amendment's Ban Against Cruel and Unusual Punishment Requires a Mandatory Appellate Review in Death Penalty Cases Which Cannot Be Waived By the Defendant.

The Petitioner Whitmore will herein define "mandatory appeal" as being one which the defendant may not waive; this contrasts to "automatic appeal" which will be defined as one which the defendant may not be precluded from pursuing, but which he may knowingly and intelligently waive. Arkansas has "automatic appeal" in all criminal cases, but no "mandatory appeal" in any case. *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988). (J.A. at 9).

Since the reinstatement of the death penalty in 1976 (*Gregg v. Georgia*, 428 U.S. 153 (1976)), only one individual has been executed without appellate review of his conviction (Gary Gilmore in Utah on January 17, 1977) and Respondent State of Arkansas asks that Ronald Gene Simmons become, after an interval of thirteen years, the second to so die. The position of the State of Arkansas is wrong for at least four reasons: First, this Court has already determined that a meaningful appellate review is essential to a constitutionally sound death penalty scheme: secondly, the absence of a mandatory appellate review in capital cases does not comport with the "evolving standard of decency that marks the progress of a

maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958); thirdly, the Arkansas death penalty statute is subject to being arbitrarily and capriciously imposed in the absence of meaningful appellate review; and fourthly, any waiver of appellate review in a capital case is contrary to public policy and adverse to the rights of society as a whole.

A. Prior Decisions of This Court Have Clearly Established That a Meaningful Appellate Review Is an Essential Element of Any Valid Death Penalty Statute.

The Eighth Amendment to the Constitution of the United States, as made applicable to the states by the Fourteenth Amendment (*Robinson v. California*, 370 U.S. 660 (1962)), provides that cruel and unusual punishment shall not be inflicted. The concerns of the Eighth Amendment have generally been heightened in the area of capital punishment because of the recognition that "the penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its irrevocability." *Furman v. Georgia*, 408 U.S. 241, 306 (1972) (Stewart, J. concurring).

Following the reenactment of various state death penalty schemes in the period following *Furman, id.*, this Court, while often sharply divided in its decisions, has been consistent in holding that "the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." *Zant v. Stephens*, 462 U.S. 862, 885 (1982). One of the strongest concerns in the imposition of the death penalty, and a core holding of *Furman v. Georgia*, 408 U.S. 241 (1972), is that this unique punishment not "be so wantonly and so freakishly imposed"

(Stewart, J. concurring, at 310), and that it not be subject to unbridled discretion by the jury (White, J. concurring, at 310-314).

Gregg v. Georgia, 428 U.S. 153 (1976), found the new Georgia death penalty scheme constitutionally acceptable based upon its bifurcated trial procedure, and that

> (A)s an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance and whether the sentence is disproportionate to those sentences imposed in similar cases.
>
> *Id.* at 198

Two other cases decided that term also found appellate review to be an important check against the arbitrary and capricious imposition of the death penalty; *Jurek v. Texas*, 428 U.S. 262, 276 (1976) and *Proffitt v. Florida*, 428 U.S. 242, 250-251 (1976).

Later decisions of this Court have served to re-emphasize and give continued vitality to the "safeguard" of mandatory appellate review discussed in *Gregg*: "[O]ur decision in this case [upholding Georgia death penalty statute] depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assume proportionality," *Zant v. Stephens*, 462 U.S. 862, 889 (1982); "[*Gregg v. Georgia*] suggested that some form of meaningful appellate review

is required," *Pulley v. Harris*, 465 U.S. 37 (1984). The importance of the appellate process was discussed again in 1987, *McCleskey v. Kemp*, 481 U.S. 279 (1987).

The one ostensible anomaly to this consistent recognition of the importance of appellate review in death penalty cases is found in *Gilmore v. Utah*, 429 U.S. 1012 (1976), wherein the individual sentenced to death declined to exercise any appeal of his sentence, and opposed the intervention by his mother as "next-friend." After granting a stay of execution, this Court later lifted the stay after finding that Gilmore was competent to waive his appeal and that his mother had no standing to assert his rights. With four justices dissenting, Mr. Chief Justice Burger noted that the question of whether Gilmore should be allowed to waive his appeal "simply is not before us." *Id.* at 1017. *Gilmore* is not dispositive on the issue of mandatory appeal but is, instead, relevant only to the issue of third-party standing and for reasons cited *infra* should be distinguished from the instant case as it did not involve the question of a constitutionally mandated appellate review nor does its holding reflect current societal standards of decency. The arguable interpretations of *Gilmore* are simply not relevant to the issues of this case.

The Arkansas Supreme Court and the Respondent State of Arkansas in this case have misinterpreted both the issues of *Gilmore* and its precedential value on the question of mandatory appeal. In its opinion in *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988) (Simmons I), the Arkansas Supreme Court failed to look beyond *Gilmore* and did not give careful consideration to the holdings of *Gregg v. Georgia*, 428 U.S. 153 (1976), *Proffitt v. Florida*, 428

U.S. 242 (1976) or *Jurek v. Texas*, 428 U.S. 262 (1976). It rejected the argument of mandatory appeal by simply noting that:

> The idea that in *Gregg, Proffitt*, and *Jurek*, the United States Supreme Court has held that there must be a mandatory or automatic appeal from the imposition of the death penalty by a state trial court seems to have crumbled with the recent actions of the court in *Gilmore v. State of Utah*. (cite omitted)
>
> *Franz v. State*, 296 Ark. at 187, 754 S.W.2d at 842, quoting from *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106, *cert. denied*, 434 U.S. 878 (1977)

The Respondent State of Arkansas, by asserting that mandatory appeal is not constitutionally required, asks this Court to roll the calendar back to a pre-*Furman* era where the most egregious violations of fundamental rights would go uncorrected solely upon the desire, however sincere, of the condemned to "take his punishment." Of more frightening implication in the constitutional context than the desire for absolution by punishment, is the belief by one writer on the subject that "most capital defendants are concerned about maintaining their tough, indifferent images. That leads some of them to demand the death penalty in order to show they are not afraid of it." W. White, *The Death Penalty in the Eighties*, 153 (1987).

A system which does not provide mandatory appeal renders our entire criminal justice system meaningless against even the most capricious whim of an accused or of the sentencing body. This is contrary to the more reasoned concern uniformly expressed by this Court:

> Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of the sanction. The Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality.
>
> *Thompson v. Oklahoma*, 487 U.S. ___, 108 S.Ct. 2687, 2710 (1988) (O'Connor, J., concurring)

Appellate review of a capital sentence is an "integral component of a state's 'constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty'." *Murray v. Giarratano*, ___ U.S. ___ (No. 88-411, June 23, 1989) (Stevens, J., dissenting at ___ U.S. ___, 45 Crim. Law Reporter 3155, 3161 quoting from *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (footnote omitted). Only when that "calm reflection" has occurred, may a presumption of "finality and legality attach[ ] to the conviction and sentence." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

B. A Mandatory Appellate Review of Death Penalty Cases Is Necessary to Reflect Contemporary Standards of Decency.

Arkansas is the only state with a death penalty statute which does not, by statute or caselaw, mandate a nonwaivable appellate review of either the conviction or the sentence imposed. See, generally, statutes footnoted in Carter, *Maintaining Systematic Integrity in Capital Cases*, 55

Tennessee Law Review 95, 114 n. 116 (1987) and U.S. Department of Justice Bureau of Justice Statistics Bulletin, *Capital Punishment, 1986* (1987).

Following the execution of Gary Gilmore in Utah on January 17, 1977, the State of Utah amended its Criminal Code in the 1977 session of its legislature to provide for automatic review of death penalty cases; Utah Code Anno. (1953) § 76-3-206 as amended by L.1977, Ch.84, § 1. Gilmore, the first person to be executed in the United States following *Gregg v. Georgia,* 428 U.S. 153 (1976), remains the only person to have been executed without appellate review. That sentence could not today be carried out under Utah law without such review.

It is well accepted that Eighth Amendment rights draw their "meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 101 (1958). Several state courts have reviewed the question of waiver of direct appeal in capital cases and have found such waiver to be contrary to public policy (as discussed *infra*).

There must be a strong presumption that the "public policy" of the thirty-six other states with capital punishment schemes reflects the "evolving standard of decency" (*Trop v. Dulles, id.*) that exists today. While it is arguably true, as the State of Arkansas contends, that "a show of hands does not necessarily establish an Eighth Amendment requirement" (Respondent's Brief in Opposition of Writ of Certiorari at 4, interpreting *Spaziano v. Florida,* 468 U.S. 447 (1984)), when a minority of one is in opposition to thirty-six there is reason to believe that the majority reflects the more widely held beliefs of society in general.

These evolving standards breathe life into our Constitution and allow it to be far more than an "ephemeral enactment[ ], designed to meet passing occasions." *Weems v. United States,* 217 U.S. 349, 373 (1910). This Court has recently recognized that the accepted standards of 1976 do not necessarily reflect the required standards of today; *Penry v. Lynaugh,* ___ U.S. ___, (No. 87-6177, June 26, 1989) which reversed, based upon a defect in the same Texas statute which had been upheld in *Jurek v. Texas,* 428 U.S. 262 (1976).

C. The Arkansas Death Penalty Statute Is Subject to Being Arbitrarily And Capriciously Imposed In The Absence of Mandatory Appellate Review.

During the period from 1983 through February of 1989, the Arkansas Supreme Court has affirmed 57.8% (11 of 19) cases on direct appeal wherein the death penalty was imposed. *Fretwell v. State,* 289 Ark. 91, 99, 708 S.W.2d 630, 634 (1986) Hickman, J., concurring) and *Robertson v. State,* 298 Ark. 131, 137, 765 S.W.2d 936, 940 (1989) (Hickman, J., concurring). In the absence of a record of the trial of Ronald Gene Simmons or an appellate review of that record, neither Petitioner Whitmore nor Respondent State of Arkansas can determine whether Simmons is within the more than 40% of those illegally convicted or sentenced.

Available figures from other jurisdictions with death penalty statutes suggest that appellate review plays an equally important role nationwide in protecting against the arbitrary and capricious imposition of this sanction. Dix, *Appellate Review of the Decision to Impose Death,* 68

Georgetown Law Journal 97 (1979) shows that the Georgia Supreme Court invalidated or reduced the death sentence in 25% of the cases decided on direct appeal during the period between April 4, 1974 and March 6, 1979. *Id.* at 111. For a comparable time period the Florida Supreme Court reversed or reduced 50% of its death penalty cases reviewed (*Id.* at 125) and Texas reversed 33% of its capital cases (*Id.* at 145). The New Jersey Supreme Court has reportedly reversed 100% of the capital cases reviewed by it within the past year (Source: Office of the New Jersey Public Defender, Arlie Conference on the Death Penalty, August 3-6, 1989.) Some authorities on the subject have estimated that as many as 60% of those sentenced to death since *Furman* were subject to having their sentences invalidated. Greenburg, *Capital Punishment As A System*, 91 Yale Law Journal 908 (1982) and Strafer, *Volunteering For Execution: Competency, Voluntariness and The Propriety of Third Party Intervention*, 74 Journal of Criminal Law and Criminology 860, 898 (1983).

The absence of mandatory appellate review skews and distorts the system of checks and balances between the branches of a triumvirate government and leaves the legislative and executive branches free to enact and enforce laws without the certainty of judicial review. See, for example, *Wilson v. State*, 295 Ark. 682, 751 S.W.2d 734 (1988) wherein the Arkansas Supreme Court remanded a capital case upon a finding that the aggravating circumstance that the crime was "committed in a especially heinous, atrocious, or cruel manner" was constitutionally defective; this Court subsequently reaching a similar result in *Maynard v. Cartwright*, 486 U.S. ___, 108 S.Ct. 1853 (1988). Upon retrial of the penalty phase Wilson was

sentenced to life without parole (unpublished opinion, Pulaski County Circuit Court, First Division, 1988).

The Arkansas Supreme Court has proven the importance of its appellate review in a number of other death penalty cases. See, for example, *Burnett v. State*, 295 Ark. 401, 749 S.W.2d 308 (1988) reversed for admission of statement taken after arrest without probable cause – sentenced to life without parole on retrial; *Ward v. State*, 293 Ark. 88, 733 S.W.2d 728 (1987) reversed for *Batson v. Kentucky*, 476 U.S. 79 (1986) error in selection of jury – sentenced to life without parole on retrial; *Miller v. State*, 280 Ark. 551, 660 S.W.2d 163 (1983) reduced to life without parole because of the insufficiency of the evidence at the penalty phase of the trial. These few cases are illustrative of the potential harms which could go unremedied without mandatory appellate review in capital cases.

The severest penalty that can be imposed by a society "must be accompanied by unique safeguards to ensure that it is a justified response to a given offense", *Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part). A mandatory appellate review, far from being a unique response, is a minimal standard to insure the avoidance of the arbitrary and capricious imposition of the death penalty.

D. Allowing a Waiver of Appellate Review in Capital Cases Is Contrary to Public Policy And Adverse to the Rights of Society.

Within the context of criminal law, "waiver" ("an intentional relinquishment or abandonment of a known right or privilege", *Johnson v. Zerbst*, 304 U.S. 458, 464

(1938)) of certain rights by an accused has been recognized as accomplishing the goals of respecting the free choice of a defendant and of allowing the "system" to operate more efficiently and cheaply. See Kaine, *Capital Punishment and the Waiver of Sentence Review,* 18 Harvard Civil Rights Civil Liberties Law Review 483, 497-8 (1983). Were these the only questions to be addressed, it is clear that Mr. Simmons' wish to be executed without appellate review, if carried out, would respect his choice and be less costly for the State of Arkansas. Far more weighty considerations, however, arise when the attempted waiver is of the review of the imposition of the death penalty.

May an accused waive any or all rights afforded under the Constitution, and if not, why not? The answer is most obviously that he may not waive all rights; *Singer v. United States,* 380 U.S. 24 (1965) makes it clear that a defendant may not waive his right to jury trial without the consent of the court and of the prosecution ("[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." *Singer, Id.* at 34-35. Nor may an accused assert a right to plead guilty to any criminal charge absent a determination of a factual basis for the plea (Federal Rules of Criminal Procedure, Rule 11 and Arkansas Rules of Criminal Procedure, Rule 24.6; *McCarthy v. United States,* 394 U.S. 459 (1969)).

Even in the instance of rights which may be waived, such right to waiver is not absolute: Implicit in the Sixth Amendment's right to assistance of counsel is the right to self representation (*Faretta v. California,* 422 U.S. 806

(1975)) but that right is not absolute when it would jeopardize the integrity of the criminal justice system.

A separate line of cases has established that a waiver of constitutional rights is impermissible when that waiver violates the rights of third parties. *Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980) held that the public's right to receive information about the criminal justice system restricted the right of a defendant to waive his right to public trial.

A public right to assurance that the death penalty is not arbitrarily or capriciously imposed may be inferred from the existence of such procedure in the remaining thirty-six states that allow such punishment as well as from the case law within those states recognizing that this public interest overrides any right to waiver by the defendant.

> We recognize, of course, that the doctrine of waiver is, in our adversary system of litigation, indispensable to the orderly functioning of the judicial process. There are, however, occasional rare situations where an appellate court must consider the interest of society as a whole in seeing to it that justice is done . . . . One such instance is surely the imposition of capital punishment . . . . It is evident that. . . . McKenna personally prefers death to spending the remainder of his life in prison. . . . the waiver concept was never intended to serve as a means of allowing a criminal defendant to choose his own sentence. Especially is this so where, as here, to do so would result in state aided suicide.
>
> *Commonwealth v. McKenna,* 476 Pa. 428, 439-41, 383 A.2d 174, 180-81 (1978)

Other state courts have reached similar results when weighing the wishes or rights of the convicted against the greater rights of society:

> [w]e are not dealing with a right or privilege conferred upon the litigant for his sole personal benefit. We are concerned with a principal of fundamental public policy. The law cannot suffer the state's interest and concern in the observance and enforcement of this policy to be thwarted through the guise of waiver of a personal right by an individual.
>
> *People v. Stanworth*, 71 Cal.2d 820, 834, 457 P.2d 889, 899 (1969) denying waiver of appellate review.

See also *Evans v. State*, 361 So.2d 654 (Ala. 1978); *Goode v. State*, 365 So.2d 381 (Fla. 1978) for state decisions upholding the public policy behind mandatory appellate review.

As an adjunct to the public policy behind appellate scrutiny of death sentences, is the question of whether the police power of the State to protect its citizens from self-destructive acts can subjugate the individual rights of the citizen. Obviously, again the answer is yes. The police powers of the states allow, if not compel, them to safeguard public health, safety, welfare, and morals. *Jacobson v. Massachusetts*, 197 U.S. 11, 24-25 (1905), and this power controls many aspects of our daily lives from the speed at which we drive or whether motorcyclists wear helmets to weightier issues of compelled blood transfusions (*Jehovah's Witnesses of Washington v. King County Hospital*, 390 U.S. 598, *reh'g denied*, 391 U.S. 961 (1967)). It is a proper and necessary part of the police power of the State

to compel review of capital cases to insure the fundamental fairness guaranteed to all citizens of the state that none among them shall be deprived of life without due process of law.

Several commentators on the subject have advocated that the decision to forego protracted appellate review should be equated to "death with dignity" by a terminally ill patient. Johnson, *The Death Row Right to Die: Suicide or Intimate Decision*, 54 Southern California Law Review, 575 (1981) and Urofsky, *A Right to Die: Termination of Appeal For Condemned Prisoners*, 75 Journal of Criminal Law and Criminology 553 (1984). This argument is fallacious for several reasons: the death of a terminally ill patient is, by definition, inevitable while that of the death row inmate is not; the death of the terminally ill is not occasioned by an act of the State; and even that decision must involve a balancing of interests, *Matter of Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976). Even the most vigorous of these advocates concede that an appellate review is appropriate before the "right to die" ensues (Urofsky, *A Right to Die, Id.*, at 581).

Nor can it be argued that the system approved in Arkansas for waiver of appeal in capital cases meets the test of the "knowing relinquishment of rights". Who has informed Mr. Simmons of trial error: his attorneys who advocate his death? the trial judge who, presumably, ruled on questions of evidence?

And who has informed Mr. Simmons as to whether he received effective assistance of counsel at the trial? One state court has found that failure to present mitigating evidence because of the wishes of the defendant

necessitated reversal of the penalty on ineffective assistance of counsel grounds because of the "fundamental public policy against misusing the judicial system to commit a state-aided suicide." *People v. Deere*, 41 Cal.3d 353, 363, 710 P.2d 925, 930 (1985). The trial counsel in *Deere*, at least, argued for life imprisonment. A "waiver" made with assistance of counsel who are advocating the death of their own client cannot conceivably rise to the level of being knowing and intelligent.

Ronald Gene Simmons was tried and convicted in a small rural town in Arkansas and sentenced to death. The people of the State of Arkansas have a compelling public interest in knowing that that sentence is both legal and appropriate and that need surpasses any arguable right of Simmons to forego appellate review.

II. The Petitioner Whitmore Has Standing To Assert A Constitutional Violation When That Violation Would Otherwise Be Without A Remedy, And When He Is Directly Effected By That Violation.

The statutory scheme in Arkansas for the imposition of the death penalty is constitutionally defective in that, for reasons cited *supra*, it does not provide mandatory appellate review in capital cases. The position of the Respondent is that no one should be allowed to seek redress of this violation; they not only decline to send anyone to learn for whom the bell tolls, they refuse to even hear the bell.

Even under the strictest interpretations of the limitations imposed upon this Court under its Article III

powers ("[we do not consider] generalized grievances about the conduct of government". *Flast v. Cohen*, 392 U.S. 83, 106 (1968)), the Petitioner Whitmore has standing to assert constitutional violation as it directly involves rights afforded to him by the State of Arkansas. Although himself confined to death row in the Arkansas prison, Whitmore is a citizen of the State of Arkansas who is entitled to the public interest protections of the Eighth Amendment. This interest is the equivalent of the public interest found in First Amendment cases conferring "standing" upon third parties; *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). Whitmore, like all other citizens of the state, has a direct, adversarial right, to require that an execution which is carried out in the name of "the people of the State of Arkansas" has not been imposed arbitrarily or capriciously.

Although not constitutionally required, the Arkansas Supreme Court has committed to a system of comparative review in death penalty cases (". . . .we must compare the wickedness, inhumanity, and heinousness of this capital case with other capital cases." *Whitmore v. State*, 296 Ark. 308, 316, 756 S.W.2d 890, 895 (1988). Petitioner has a direct and substantial interest in having the data base against which his crime is compared to be complete and to not be arbitrarily skewed by the omission of any other capital case.

If, *arguendo*, the Petitioner's assertion of standing on traditional grounds is deemed inadequate, he would argue that an exception should be made in the present case, as this Court has, in past cases, recognized that the strict requirement of standing is, in some applications, only a "rule of practice" and that exceptions may exist

"where there are weighty countervailing policies", *United States v. Raines*, 362 U.S. 17, 22 (1960), citing *Barrows v. Jackson*, 346 U.S. 249 (1953) and *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958). It follows from the peculiar features on the merits of the mandatory appeal claim that such countervailing policies are present in the case at hand, and standing should thereby be granted.

Such weighty policy considerations have often been found to exist in the area of First Amendment rights: *Eisenstadt v. Baird*, 405 U.S. 438 (1972) ("one who acted to protect the rights of a minority and the minority itself" *Id.* at 445); *Dombrowski v. Pfister*, 380 U.S. 479 (1965) ("we have fashioned this exception to the usual rules governing standing" [cite omitted] because of the " . . . danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application". [cite omitted]. *Id.* at 486-487.

Like the relaxation of standing in the area of the First Amendment, the requirements for standing in the present case should be relaxed as well as a precaution against the inhibitory effect on Eighth Amendment due process protections, which also exist to protect the greater rights of society in assuring that punishments inflicted not be arbitrarily imposed.

In *Singleton v. Wulff*, 428 U.S. 106 (1976), this Court indicated that standing of third parties would be allowed where there was a closeness of the relationship between the litigant and the person whose right he seeks to assert, and an inability of the third party to assert his own right. In *Wulff*, a physician was seeking third party standing to

assert the rights of women patients as against governmental interference with abortion decisions. In allowing third party standing, the Court explained that a potential obstacle to a party asserting his own rights might be the "imminent mootness" of the individual's claim were it not heard by the Court through the standing of the third party petitioner.

In the present case, the threat of mootness is equally impending; if the Petitioner is not granted standing, Simmons will be executed without the constitutionally required mandatory appellate review, and the question of whether Arkansas' law passes constitutional muster will no longer be open to address by the Court. "Execution of the condemned prisoner obviously would moot his claims." Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. Criminal Law & Criminology 860, 911, n. 223 (1983). "The unique severity of the death sentence and the public interest in its imposition" demands that it be carried out pursuant to no less than constitutionally minimum standards. *Franz v. State*, 296 Ark. 181, 199, 754 S.W.2d 839, 849 (1988) (Hays, J. dissenting). (J.A. at 26)

Quoting United States District Judge G. Thomas Eisele in the case of *Franz v. Lockhart*, 700 F.Supp. 1005 (E.D. Ark., 1988):

> What is at stake here is our collective right as a civilized people not to have cruel and unusual punishment inflicted in our name. It is because of the crying need to vindicate that right, that basic value, that Simmons should be held unable "to waive resolution in state courts" [cite omitted] of the correctness of his death sentence. *Id.* at 42-43.

Another compelling reason for a departure from the traditional rules of standing in the present case is that in similar situations the Court has held that the rule's rationale disappears when a "statute in question has already been declared unconstitutional in the vast majority of its intended applications." *United States v. Raines*, 362 U.S. 17, 22 (1960). Of the thirty-seven states authorizing capital punishment, only Arkansas fails to provide for mandatory appellate review of either the entire or the sentencing phase (*Franz v. State*, 296 Ark. 181, 196-197, 754 S.W.2d 839, 847-848 (1988) (Glaze, J. dissenting). (J.A. at 22) The statutory schemes in the other jurisdictions have arisen from their interpretations of *Furman v. Georgia*, 408 U.S. 241 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976) and are analogous to a finding by each of these states that both public policy and constitutional considerations would render any statute without such a provision to be invalid.

In another case, *United States v. Reese*, 92 U.S. 214 (1875), the Court struck down a statute dealing with voting rights, and in so doing, the Court permitted a party to prevail by asserting the rights of third parties. Even though the Court spoke in terms of severability, it implicitly decided a standing question, that the defendant could challenge the validity of a statute despite the fact that as applied to him, it was constitutional. Similarly, in *Wuchter v. Pizzutti*, 276 U.S. 13 (1928), where a statute was declared constitutionally infirm because a defendant might not receive notice of a suit against him, the petitioner, although he received notice in the actual suit and was thereby not prejudiced by the statutory weakness,

was nevertheless allowed to assert the statute's unconstitutionality on the ground that other defendants might not receive notice under it. These examples of litigants having prevailed by showing that a statute violated the constitutional rights, not of themselves, but of third parties, are examples of exceptions the Court has allowed to the general rule that a party does not have standing to assert unconstitutional application of a statute to another.

In the present case the Petitioner is attempting, similarly, to assert that Arkansas' death penalty statute is unconstitutional as applied to third parties (i.e. Simmons) coming within its terms. And similarly to the previously cited instances, the perpetuation of significant societal values calls for a relaxation of the traditional standing requirements.

"Rather than recognizing no rule for the courts when societal rights are abridged, standing ought to be accorded to citizens. Societal rights embody promises that the sovereign has made in return for exacting the duties of citizenship." Dow, *Standing and Rights*, 36 Emory Law Journal 1195, 1216 (1987)

In the present case, to allow the State of Arkansas to enforce its unconstitutional death penalty statutes in the execution of Simmons, can be seen as an encroachment upon societal rights to live in a civilized community free from deprivation of life without due process of law. Such a violation cries out for a relaxation of the traditional notions of standing to allow the merits of the Petitioner's case to be heard by this Honorable Court.

CONCLUSION

For the reasons and authorities cited above, the decision of the Arkansas Supreme Court should be reversed.

Respectfully submitted,

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SEP 26

JOSEPH F. SPANIOL
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JONAS H. WESTMORE, INDIVIDUALLY
AND AS NEXT FRIEND OF
RONALD GENE SIMMONS ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

RONALD GENE SIMMONS, SR. ..... *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR THE RESPONDENT RONALD GENE SIMMONS, SR.

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ARKANSAS LEGISLATIVE DIGEST, INC.

QUESTIONS PRESENTED

I.

WHETHER THE EIGHTH AMENDMENT'S BAN AGAINST CRUEL AND UNUSUAL PUNISHMENT REQUIRES A MANDATORY APPELLATE REVIEW IN ALL CASES IN WHICH THE DEATH PENALTY IS IMPOSED.

II.

WHETHER A THIRD PARTY HAS STANDING TO ASSERT THE VIOLATION OF CONSTITUTIONAL RIGHTS WHEN THE PARTY DIRECTLY AFFECTED DOES NOT ASSERT THE RIGHT.

PARTIES TO THE PROCEEDINGS[1]

[1]The caption of the case does not contain the names of all of the parties. Is Ronald Gene Simmons, Sr., a party, or not? To remove any uncertainty about his status as a party in this matter, Simmons' attorneys filed with this Court a motion to have Simmons declared a party. Said motion was received April 1, 1989, in the Office of the Clerk of the Supreme Court of the United States. Simmons' lawyers thereafter received a letter from the U.S. Supreme Court Clerk's office dated April 5, 1989, which stated in part: "The motion to declare Ronald Gene Simmons a party for the purpose of filing a brief in opposition was received April 1, 1989, and is herewith returned as unnecessary." Again, a letter was received from the U.S. Supreme Court Clerk's office dated July 19, 1989, which stated in part: "By copy of this letter to all counsel, I am requesting that any future pleadings, correspondence, etc., filed in this case, that copies be served upon you as counsel for Ronald Gene Simmons. I am enclosing an Appearance Form for you to complete as counsel for Ronald Gene Simmons." On July 25, 1989, the Appearance Form, Supreme Court of the United States, No. 88-7146, was completed and filed with this Court by letter dated July 25, 1989. On August 2, 1989, Simmons' lawyers and lawyers for the respondent State of Arkansas mailed for filing a motion for additional time and for divided time for oral argument, and as of this time, the Court has not acted upon Simmons' motion requesting the opportunity to present oral argument in this case. Apparently, the Petitioner does not regard Ronald Gene Simmons, Sr., as a party in this case because Simmons' name as a respondent is continually omitted from the caption of the case in all of Petitioner's pleadings. Therefore, after all of this, the question still exists, "Is Ronald Gene Simmons, Sr., a party in this case? Will Ronald Gene Simmons, Sr., be afforded the opportunity to participate in oral argument in this case? Isn't Ronald Gene Simmons, Sr., the real party in interest in this case?" In conclusion, respondent Simmons contends that the caption of the case does not contain the names of all of the parties.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-7146

JONAS H. WHITMORE, INDIVIDUALLY
AND AS NEXT FRIEND OF
RONALD GENE SIMMONS ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

RONALD GENE SIMMONS, SR. ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR THE RESPONDENT RONALD GENE SIMMONS, SR.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court in *Franz v. State* (Simmons I), reported at 296 Ark. 181, 754 S.W.2d 839 (1988), is reprinted in the Joint Appendix at page 4.

The opinion of the Arkansas Supreme Court in *Simmons v. State* (Simmons II), reported at 298 Ark. 193, 766 S.W.2d 422 (1989), is reprinted in the Joint Appendix at page 29.

The opinion of the Arkansas Supreme Court in *Simmons v. State* (Simmons II), reported at 298 Ark. 255, 766 S.W.2d 423 (1989), is reprinted in the Joint Appendix at page 34.

JURISDICTION

Article Three of the United States Constitution gives this Court jurisdiction over actual cases and controversies between ligitimate parties. This petitioner has no standing individually, and therefore seeks to gain next friend status of Ronald Gene Simmons, Sr., whose competency and age are not questioned; however, the incompetency of the petitioner is presently admitted. (See *Whitmore v. State*, 299 Ark. 55 [1989].) Therefore, this Court is without jurisdiction. *Gilmore v. Utah*, 429 U.S. 1012.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The First Amendment to the Constitution of the United States provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . .

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

During the evening hours of March 15, 1989, Ronald Gene Simmons, Sr., was eating his last meal. His execution was set for the next day at 7:00 a.m., the 16th day of March, 1989. The Respondent Simmons had previously been tried in two separate cases, convicted, and sentenced to death for capital murder of sixteen individuals, including fourteen family members. After each conviction and sentence of death, Respondent Simmons was fully advised by counsel of his right to appeal, potential grounds for appeal, and many other things concerning the appellate process. Respondent Simmons took the position that whether or not to appeal was a personal decision that could only be made by him, and it was his decision that the verdicts in the two previous cases were just and proper, and his only request was that the sentence be carried out without any delay; that life was cruel for him and he was suffering with it. Immediately after Respondent Simmons took this position, parties opposed to capital punishment, including a Catholic Priest and other death row inmates, came forward in both the Simmons I and the Simmons II cases, and attempted to intervene and delay these two proceedings in the following particulars: First, by claiming next friend status, and second, by asserting that the United States Constitution required a mandatory appeal in death penalty cases that cannot be waived by the defendant.

The trial court immediately gave these interlopers a hearing on their petitions, and also conducted a competency hearing to determine whether or not Respondent Ronald Gene Simmons, Sr., was competent and had knowingly and intelligently waived his right to appeal. After a full hearing on these matters, the trial court ruled that Respondent Ronald Gene Simmons, Sr., was competent, that he had in fact knowingly and intelligently waived his right to appeal, and as such, the petitioners would have no standing as next friend or otherwise,

and as a matter of law, there was no mandatory appeal that could not be waived by a competent defendant.

The trial court's decision in Simmons I was immediately appealed to the Arkansas Supreme Court; and the Arkansas Supreme Court, without any notice to Respondent Ronald Gene Simmons, Sr., and without any meaningful opportunity for him to be heard on the matter, granted the petitioners' request for stay of execution. However, ultimately, the Arkansas Supreme Court, after a full hearing on the matter, reversed themselves and lifted the stay of execution, and specifically found that Respondent Ronald Gene Simmons, Sr., was competent and had knowingly and intelligently waived his right to appeal; that the petitioners as such would have no standing as next friend or otherwise; and that the law of Arkansas and the Constitution of the United States of America do not require a mandatory appeal that cannot be waived by a competent defendant.

Immediately thereafter, the petitioners in Simmons I filed for a petition for writ of habeas corpus in Federal District Court contending essentially the same things, and again, the Federal District Judge, without any notice to Respondent Ronald Gene Simmons, Sr., and without any meaningful opportunity for him to be heard on the issue, granted a stay of execution. On September 23, 1988, Federal District Judge G. Thomas Eisele denied the petitioners' writ of habeas corpus "insofar as it attempted to assert any claim that Respondent Simmons may not make a knowing and intelligent waiver of any right he may have to state court appellate review by reason that petitioners do not have standing to assert such a claim, and this Court therefore lacks jurisdiction over such claim." In a hearing set for September 29, 1988, at 10:00 a.m., Mr. Simmons was brought before Judge Eisele for the purpose of ascertaining whether Simmons did in fact wish to waive further judicial review of his state court conviction and sentence, and on

September 29, 1988, Judge Eisele ordered Simmons committed to the custody of the Attorney General for a period of thirty days to be transferred to the Medical Center for Federal Prisoners at Springfield, Missouri, for a psychiatric observation and examination, during that period to determine Simmons' present competence to waive habeas corpus relief, with a report of the examinations to be filed with the Court promptly upon conclusion. On September 29, 1988, Judge Eisele entered an order appointing Attorney John Wesley Hall as an expert to review the state and federal records in Simmons' case, and to advise Simmons independently as to the merit of any arguments which might be made on Simmons' behalf. On October 18, 1988, Judge Eisele ordered the court reporter for the Circuit Court of Franklin County, Arkansas, to immediately undertake and complete the preparation of a transcript of all proceedings of record in that Court in connection with the trial of Simmons. On December 29, 1988, Judge Eisele ordered:

> The Court finds Simmons is competent to waive Federal habeas corpus review of his conviction and sentence. After court-appointed expert informs the Court of his completed review, the Court will order Mr. Simmons' return to Little Rock to confer with the expert. Thereafter a hearing will be held to give Mr. Simmons the opportunity to make a knowing and intelligent waiver of his rights to habeas corpus review.

On March 8, 1989, Judge Eisele ordered Simmons to confer with the Court-appointed expert, John Wesley Hall, on the morning of 3-9-89, at the Federal Courthouse in Little Rock. The Judge further ordered:

> A hearing will be held at 1:30 p.m., at which time Mr. Hall and Mr. Simmons will report upon their conference, and Mr. Simmons shall make known his desires as to waiver of federal review of his state court conviction.

On March 9, 1989, Judge Eisele ordered, on the basis of the findings and conclusions stated in open court:

> The petition for habeas corpus is dismissed. The temporary stay of execution filed on 8-3-88 is dissolved and set aside.

On February 28, 1989, attorney John Wesley Hall, Jr., the expert appointed by Judge Eisele, after reviewing the complete transcript of the case and visiting personally with Mr. Simmons, filed his report. Said report does not indicate any basis for ineffective assistance of counsel, and in reviewing the psychiatric and psychological evaluation filed with the court of 11-29-88, and other matters before the Court, Judge Eisele found Mr. Simmons competent to waive federal habeas corpus review of his conviction and sentence.

On February 10, 1989, the Simmons II trial was held, and a Johnson County jury convicted Simmons of capital murder and sentenced him to death by lethal injection to be carried out on March 16, 1989, at 7:00 a.m. Following the trial, Mr. Simmons notified the trial judge of his desire to waive his appeal, and after an evidentiary hearing held on March 1, 1989, the trial judge found that Simmons was competent to waive his right to a direct appeal. In accordance with the Arkansas Supreme Court's decision in *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988), Simmons submitted to the Supreme Court of Arkansas a transcript of the lower court's proceedings along with his petition and request for expedited review. After careful review of those lower court proceedings, the Arkansas Supreme Court granted petitioner Simmons' request. After noting that the trial court considered and made a part of this proceeding the same psychological evaluations that were introduced in *Franz*, in addition the trial court added to the record the forensic evaluation which was filed in a proceeding before the United States District Court, Eastern District of

Arkansas, and the court further found that the trial judge and Simmons' counsel performed an exceptional job in examining and exploring Simmons' capacity to understand the choice between life and death and his ability to know and to intelligently waive any and all rights he might have in an appeal of his sentence. In addition, Simmons' counsel thoroughly discussed seven possible points that could be argued for reversal on appeal, and Simmons responded by stating he understood those points and that he rejected all encouragement and suggestions to appeal. *Simmons v. State*, 766 S.W.2d 423, Ark. (1989).

After this last ruling, as mentioned earlier, Respondent Ronald Gene Simmons, Sr., was enjoying his last meal on the 15th day of March, 1989, prior to being executed at 7:00 a.m. on the following morning, when he happened to notice the monitor on the TV in the room, a news flash that the U.S. Supreme Court had stayed his execution pursuant to an application for stay of execution pending petition for writ of certiorari to the Supreme Court of Arkansas, filed herein by Petitioner Jonas H. Whitmore, individually and as next friend of Ronald Gene Simmons. This stay of execution by the U.S. Supreme Court was granted without any notice to respondent Ronald Gene Simmons, Sr., and without any meaningful opportunity for him to be heard on the issue.

Subsequent to that ruling by the High Court, the petitioners in Simmons I filed a notice of appeal to the 8th Circuit Court of Appeals, and thereafter, filed a motion for stay of proceedings pending the outcome in the Simmons II case that is presently before the U.S. Supreme Court. The State of Arkansas, through its Attorney General's office, filed a response essentially acquiescing that the proceedings in the 8th Circuit Court of Appeals in Simmons I should be stayed pending the outcome of Simmons II before this court, and again, without any notice to Respondent Ronald Gene

Simmons, Sr., and without any meaningful opportunity for him to be heard, the 8th Circuit Court of Appeals issued its order staying all of those proceedings pending the outcome of Simmons II before the U.S. Supreme Court.

On July 3, 1989, the U.S. Supreme Court granted writ of certiorari. On April 1, 1989, Simmons filed a motion to be declared a party in the proceedings, which the Clerk later ruled was unnecessary, and on August 2, 1989, Simmons and the attorneys for the State of Arkansas filed a joint motion requesting additional time and an opportunity for Simmons to participate in the oral argument so that his personal interests can be asserted prior to final resolution of this matter.

SUMMARY OF ARGUMENT

The bulk of petitioner's argument is grounded in three cases, *Gregg v. Georgia*, 428 U.S. 153, 1976; *Jurek v. Texas*, 428 U.S. 262, 1976; and *Proffitt v. Florida*, 428 U.S. 242, 1976. But what petitioner fails to recognize is that a later case is more clearly decisive on the question of mandatory appeal, and that case is *Gilmore v. Utah*, 429 U.S. 1012, 1976.

Petitioner attempts to characterize Arkansas as the only state with a death penalty statute which does not by statute or case law mandate a non-waivable appellate review of either the conviction or the sentence imposed. However, the only case going before the Supreme Court on this question was *Gilmore*. Therefore, it is not clear whether any state in the nation has a mandatory appeal that cannot be waived by a competent defendant. Certainly, Arkansas has no prohibition against a waiver if it is by a competent defendant who has made a knowing and intelligent waiver under safeguards enumerated by the law of the state.

Simmons does not believe that the Arkansas death penalty statute is subject to being arbitrarily and capriciously imposed, and he does not assert that it is in his case. However, the numerous safeguards that are built into the statutory scheme in Arkansas could better be addressed by the respondent State of Arkansas in its brief. Simmons would suffice to say that as a matter of fact, it has not been subject to being arbitrarily and capriciously imposed in the State of Arkansas for the past twenty-six years, because no one has been executed in Arkansas during that period of time.

Allowing a waiver of appellate review in capital cases under certain conditions is not contrary to public policy or adverse to the rights of society. For the prisoner convicted and condemned by society and restrained in a tiny cell with

practically no freedom, the option of termination of appeals and being executed may represent the only opportunity to exercise any personal choice in order to affect his or her fate. For the abolitionist, this may be the most difficult aspect of the problem, for granting the condemned person the right to bring on death affronts their belief in the sanctity of human life. But what must be remembered at all times is that the life involved is the life of the prisoner. It is his or her life at stake, his or her personal autonomy, and not that of the abolitionist. (Quoting from Urofsky, *A Right to Die, Termination of Appeal for Condemned Prisoners*, Vol. 75, No. 3, The Journal of Criminal Law and Criminology, 553, 1984.)

Petitioner Whitmore does not have standing on any of the traditional grounds, and he has failed to even allege grounds for standing. Instead he asks this Court to grant an exception and relax the requirements for standing so that the Court may address what petitioner characterizes as the abridgement of societal rights, and to remedy it, he says this Court should grant standing to any citizen. To this, respondent Simmons would argue that in the first place, societal rights are not being abridged but are being served in this case; secondly, the petitioner has no standing in this matter; and thirdly, citizens generally should not be able to acquire standing as next friend or otherwise in cases of this nature unless some bases exist for their claims. To relax the standards as requested by the petitioner would be to enlarge the jurisdiction of this Court in direct violation of Article Three of the United States Constitution opening the door to allow any citizen in any capital case to intervene and thwart the workings of the Court by claiming next friend status.

ARGUMENT

IA

WHETHER THE EIGHTH AMENDMENT'S BAN AGAINST CRUEL AND UNUSUAL PUNISHMENT REQUIRES A MANDATORY APPELLATE REVIEW IN ALL CASES IN WHICH THE DEATH PENALTY IS IMPOSED.

In *Whitmore v. State*, 299 Ark. 55 (1989), Justice Tom Glaze writing for the majority said:

> [1] The Whitmore and Simmons cases are further examples of a chain of Arkansas cases that reveal how the state and federal judicial systems have permitted applications for post-conviction remedies to get out of control. . . .

Whitmore's Rule 37 petition here and his intervention in the Simmons case, now pending in the United States Supreme Court, depict only one of the problems — albeit an absurd one — that the courts face when attempting to bring an end to criminal cases once they are launched into the procedural appellate and post-conviction maze. In his post conviction petition now before us, Whitmore claims that he did not receive a fair trial, because, among other things, his trial attorney was ineffective. In support of his argument, he contends his trial counsel failed to present available evidence that Whitmore had a diminished capacity when he killed his victim. Whitmore also points to his lengthy psychiatric history as well as to his alcoholism and incest and sexual abuse that occurred in his family. In sum, Whitmore objects that his trial counsel made no use of Whitmore's psychiatric evidence to show either diminished capacity as to his guilt or mitigating circumstances at the penalty phase. Further,

Whitmore contends that he is presently insane. In pursuing his petition before the United States Supreme Court, Whitmore makes no mention whatsoever of his pending petition in this court and the diminished capacity claims that he asserts in the petition.

Obviously, if Whitmore has a diminished capacity or psychiatric problem, how can he have standing to intervene in behalf of Simmons? In *Rees v. Peyton*, 384 U.S. 312 (1966), the Supreme Court held that if a defendant is determined to be competent, then a next friend has no standing to pursue further proceedings when the defendant chooses not to proceed. *See Gilmore v. Utah*, 429 U.S. 1012 (1976), where the Supreme Court reversed the record bearing on Gilmore's competency and decided his mother did not have standing to speak for him. Here a state trial court, this court, and a federal district court have either ordered psychiatric examinations or reviewed those examinations and have concluded Simmons has the capacity to waive his right to appeal or refuse to pursue any claims he may have. Nonetheless, the United States Supreme Court has allowed Whitmore, who has placed his own mental capacity in issue in a pending state proceeding, to intervene on behalf of Simmons so that Whitmore can argue claims Simmons steadfastly waives and refuses to raise. If the judicial system is to maintain integrity, we can ill afford to permit such a willful and improper manipulation of post-conviction procedures by a defendant.

The case before this Court could more accurately be captioned as, *"Abolitionists vs. Capital Punishment."* The arguments advanced by the petitioner, and many of the responses brought on by necessity by the respondents, in reality will have very little to do with Mr. Whitmore or Mr. Simmons. It would appear that they may not be relevant to these proceedings, and a question still remains whether Mr.

Simmons is a party, and if he is a party or not, will he be able to argue his side in this matter. If Simmons were allowed to argue these weighty notions raised by petitioner, Simmons' argument would be that common sense should prevail; that the Court should go back to the basics of stare decisis, because both of the points raised by petitioner, mandatory appeal and standing, have heretofore been decided against petitioner in a single case, *Gilmore v. Utah*, 429 U.S. 1012 (1976). The bulk of petitioner's argument is grounded in three cases: *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); and *Proffitt v. Florida*, 428 U.S. 242 (1976). But what petitioner fails to recognize is that a later case is more clearly on point, as determinative of the issues that petitioner wants to raise on this appeal. That case is *Gilmore*, which should be binding precedent that anyone else could follow and rely upon. The only distinction between the *Gilmore* case and the *Simmons* case is that the petitioner does not question Simmons' competency, and could not, since Mr. Simmons' competency has been determined recently by three independent court evaluations. *Simmons v. State*, 766 S.W.2d 423 (Ark., March 10, 1989).

Petitioner contends that *Gilmore* is not dispositive of the issue of mandatory appeal but is instead relevant only to the issue of third party standing.

Gilmore was a landmark decision. The abolitionists had been successful in abolishing capital punishment for a decade or more, and then Gilmore came along, willing to waive his rights to appeal his conviction, willing to waive any flaws in the trial procedures below, willing to waive even the constitutionality of a statute under which he was convicted, at a time when there were serious questions about the constitutionality of the Utah statute, and even some concern about Gilmore's competency. In spite of this, the U.S. Supreme Court allowed Mr. Gilmore to forego any appeal of his conviction, and in fact, be executed. Now the petitioner

contends that the Arkansas Supreme Court and the respondent State of Arkansas have misinterpreted both the issues of *Gilmore* and its precedential value on the question of mandatory appeal.

After a full reading of the text of the *Gilmore* decision, the only basis for petitioner's argument in that regard is Chief Justice Burger's comments:

> In his dissenting opinion, Mr. Justice White suggests that Gary Mark Gilmore is unable, as a matter of law, to waive the right to state appellate review. Whatever may be said as to the merits of this suggestion, the question simply is not before us. Gilmore, duly found to be competent by the Utah courts, has had available meaningful access to this Court, and has declined expressly to assert any claim here, other than his explicit repudiation of Bessie Gilmore's effort to speak for him as next friend. It follows therefore that the Court is without jurisdiction to consider the question posed by the dissent.

When Chief Justice Burger said the question (of mandatory appeal) is simply not before us, is perhaps subject to different interpretations. Petitioner's interpretation is that the *Gilmore* case is not dispositive on the issue of mandatory appeal. However, if the four Justices dissenting could have mustered one more Justice on their side of the argument, the holding of the case would have been that Gary Mark Gilmore was unable as a matter of law to waive the right to state appellate review, and the petitioner's argument then would have been that the *Gilmore* case is totally dispositive of the issue of mandatory appeal, and is good precedent and should be followed.

There is yet another argument why the *Gilmore* case *is* dispositive on the issue of mandatory appeal. Mr. Chief Justice

Burger writing for the majority said:

> After examining with care the pertinent portions of the transcripts and reports of state proceedings, and the response of Gary Mark Gilmore filed on December 8, I am in complete agreement with the conclusion expressed in the Court's order that Gary Mark Gilmore knowingly and intelligently, with full knowledge of his right to seek an appeal in the Utah Supreme Court, has waived that right.

Question: How can you waive that right to appeal if "the Eighth Amendment's ban against cruel and unusual punishment requires a mandatory appellate review in a death penalty case which cannot be waived by the defendant"? The majority decision in the *Gilmore* case in determining that he had waived his right to appellate review is stating, at least by implication, that the Constitution allows for such a waiver. If the majority felt otherwise, they could have denied Gilmore's attempted waiver, with or without Bessie Gilmore's next-friend application. So the *Gilmore* case is not just a question of standing as advocated by the petitioner. It is binding precedent on the question of mandatory appeal and it is good precedent on the issue of standing, and to this day, the *Gilmore* decision has never been overruled. It reflects contemporary standards of decency in our changing society by recognizing that even a murderer has certain rights and dignities, and freedom of choice, and that no third party, no matter how noble their intentions, should be allowed to decide what course of action is best for a particular individual, notwithstanding that individual's contrary views.

IB

A MANDATORY APPELLATE REVIEW OF DEATH PENALTY CASES IS NOT NECESSARY TO REFLECT CONTEMPORARY STANDARDS OF DECENCY.

Petitioner blatantly states that "Arkansas is the only state with a death penalty statute which does not by statute or case law mandate a non-waivable appellate review of either the conviction or the sentence imposed." This assertion, although unfounded and not properly documented, begs the question. The question is, "Can any state, by statute, case law, or otherwise, mandate a non-waivable appellate review of either the conviction or the sentence imposed in a death penalty case?", and the only answer is, that Utah did not in 1976. See *Gilmore*. Respondent Simmons would dispute the assertion that these other states have mandatory appeals that cannot be waived in a death penalty case, and even if they did have such a rule, it could not be asserted as petitioner is attempting to do so, until such time as that state's rule were tested before the U.S. Supreme Court for its constitutionality. Respondent Simmons is not aware of any of these other states referred to by petitioner as ever having gone before the U.S. Supreme Court to uphold the constitutionality of such a mandatory rule, and respondent Simmons would contend that if and when one of those states has a proper occasion to test any purported mandatory appeal, the U.S. Supreme Court will strike the rule down as being unconstitutional to a capital defendant, as being violative of a capital defendant's constitutional rights, of religion under the First Amendment, of the right of privacy in the "liberty" protected by the due process clause of the Fifth and Fourteenth Amendments and possibly the Ninth Amendment conceived as a rule against cramped construction, or from the privileges and immunities clauses of Article IV and of the Fourteenth Amendment. Encompassing rights to shape one's inner life and rights to control the face one presents to the world, they

have materialized like holograms from the "amanations" and "penumbras" most recently dubbed the "shadows of the First, Third, Fourth, and Fifth Amendments". They elaborate the "blessings of liberty" promised in the Preamble, and have been held implicit in the Eighth Amendment's prohibition against cruel and unusual punishments. (Quoting in part from Professor Tribe, p. 613, *Southern California Law Review*, Vol. 54.)

IC

WHETHER THE ARKANSAS DEATH PENALTY STATUTE IS SUBJECT TO BEING ARBITRARILY AND CAPRICIOUSLY IMPOSED IN THE ABSENCE OF MANDATORY APPELLATE REVIEW.

Simmons does not believe that the Arkansas death penalty statute is subject to being arbitrarily and capriciously imposed, and he does not assert that such is the case. Simmons believes that the respondent State of Arkansas can better address this point being raised by petitioner, because respondent State of Arkansas is more familiar with all of the procedures and safeguards that are included in the statutory scheme for administering the death penalty than is respondent Simmons.

However, Simmons would contend that the Arkansas death penalty statute has not been subject to being arbitrarily and capriciously imposed in the absence of mandatory review for the past twenty-six years, because as a matter of fact, no one has been executed in Arkansas for the past twenty-six years, and according to a recent U.P.I. release from the Bureau of Justice statistics, an arm of the Justice Department, it is reported that only twenty-five people were executed in eight states in 1987, the most since the Supreme Court reinstated the death penalty in 1976, and as of December 1, 1988, a record of 1,984 offenders were on death row in thirty-four states.

Obviously from these statistics, capital punishment has not been arbitrarily and capriciously imposed in Arkansas or in the nation in the absence of mandatory appellate review.

ID

ALLOWING A WAIVER OF APPELLATE REVIEW IN CAPITAL CASES UNDER CERTAIN CONDITIONS IS NOT CONTRARY TO PUBLIC POLICY OR ADVERSE TO THE RIGHTS OF SOCIETY.

In Urofsky, *A Right to Die: Termination of Appeal for Condemned Prisoners*, Vol. 75, No. 3, *The Journal of Criminal Law & Criminology*, 553, 1984:

> Although the death sentence is "qualitatively different from a sentence of imprisonment" as the Supreme Court has recognized, the doctrine of waiver in this area is derived substantially from general rules of waiver in criminal cases. Under early common law doctrine, an accused could not waive any rights intended for his protection. Later, he was allowed to waive those personal to himself, but not those in which the state maintained an interest. Currently, if there is no constitutional or statutory prohibition, or any public policy involved, an accused may waive any privilege. (See *Schick v. United States*, 195 U.S. 65, 71 [1904].) Page 562 . . .

If it is agreed that current law allows condemned prisoners to terminate their appeals, it must nonetheless be noted that opponents of capital punishment believe that they should not be allowed to do so. The most common argument is that acquiescence in the sentence amounts to state-abetted suicide. In his dissent in *Bishop*, Justice Marshall, who has consistently argued, albeit unsuccessfully so far, that the death sentence is unconstitutional under the Eighth Amendment, charged that

> "the Court has permitted the State's mechanism of execution to be triggered by an entirely arbitrary factor: the defendant's decision to acquiesce in his own death. In my view, the procedure the Court approves today amounts to nothing less than state-administered suicide." For abolitionists, the death penalty is "no less [barbarous] on those occasions when a murderer welcomes his own legal execution" than when the prisoner involuntarily goes to death. . . . For an abolitionist, there is apparently no middle ground; any execution by the state must be resisted. Pp. 565-566.

If one looks more closely at these arguments and examines them in the light of both legal and ethical considerations, their surface logic fails. First, ever since Gary Gilmore ended a ten-year moratorium on executions in this country, each new execution has brought dire warnings of an impending national bloodbath. Certainly with nearly thirteen hundred persons on death row and a net addition of approximately one hundred each year, the nation would have to execute ten persons a week for three years just to catch up with the backlog. But the facts show that despite indications of a growing dissatisfaction with endless appeals, the courts continue to insist on individualized evaluations of each case. Even Bedau concedes that the "avalanche" has failed to materialize. Unless and until firm evidence is presented that voluntary termination of appeal does in fact affect the rights of other prisoners, there should be no restrictions on these persons that prevent them from exercising their rights. Page 567 . . .

If, as the abolitionists argue, capital punishment is an inhumane deprivation of rights as well as a degradation of the individual, then why should not death row inmates be allowed — if they themselves so choose — to accept their punishment with dignity? It is certainly ironic that

in the *Gilmore* case, the American Civil Liberties Union passionately fought to prevent the execution of a convicted murderer who wished to die, claiming that Gilmore had no right to do so. It then turned around and argued that a right to die existed for Karen Ann Quinlan, who was unable to express her wishes one way or the other. Page 568 . . .

The Supreme Court has never addressed the issue of suffering attached to the death sentence aside from the actual mode of execution, and that case came down in 1890 when the Court approved the use of the electric chair. Punishments are cruel, held the Court, "when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies something inhuman and barbarous, something more than the mere extinguishment of life." Not until 1958, in a non-death penalty case, did the Court hold that a person's humanity must be respected regardless of guilt or crime. Abolitionists consider capital punishment in itself violative of the Eighth Amendment, but even those who favor the death penalty ought to concede that months or years on death row is certainly "more than the mere extinguishment of life." If one is going to argue that even condemned murderers retain some spark of humanity, some rights of individual autonomy, then something must be done to either improve death row conditions, or permit those who wish to terminate that existence through execution of sentence the right to do so. Page 573 . . .

For the prisoner, convicted and condemned by society and restrained in a tiny cell with practically no freedom, the option of terminating appeals and being executed may represent the only opportunity to exercise any personal choice in order to affect his or her fate. For the abolitionists, this may be the most difficult aspect of the

problem, for granting the condemned person the right to bring on death affronts their belief in the sanctity of human life. But what must be remembered at all times is that the life involved is that of the prisoner; it is his or her life at stake, his or her personal autonomy, and not that of the abolitionist. Pp. 578-579.

Quoting from Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?* 54 Southern California Law Review, 575 (1981):

In order to be considered suicide, the victim must also actively set the death producing agent in motion. The terminal patient, to the extent that his physical condition results from natural causes and is not self-induced, certainly cannot be classified as suicidal because he refuses further treatment. Neither can the capital defendant, who may have committed murder for many other reasons, be said to have put *himself* on death row in an attempt at self-destruction. Society, represented by a jury of his peers, concluded that the prisoner deserved to die; he had no control over the outcome of their deliberations. Pp. 617-618.

What right does petitioner Jonas H. Whitmore have to unilaterally interject himself into Mr. Simmons' case and thereby deny Mr. Simmons the basic personal right of choice and to further subject Mr. Simmons to the prolonged agony and suffering brought about by these unreasonable and unwanted delays? The obvious answer is that Mr. Whitmore does not have that right.

In his brief, petitioner attempts to chastise Simmons' attorneys, trial judge, and perhaps by implication the Arkansas Supreme Court, Federal District Judge G. Thomas Eisele, and court-appointed expert, attorney John Wesley Hall, when petitioner raises these questions: "Who has informed Mr.

Simmons of trial error: his attorneys? Who advocates his death? The trial judge who, presumably, ruled on the questions of evidence? And who has informed Mr. Simmons as to whether he received effective assistance of counsel at the trial?" In raising these questions, petitioner ignores the apparent answers which are noted throughout the voluminous record that was established in both Simmons I and Simmons II.

Specifically, in Simmons I after the trial court had already conducted two or more hearings and declared Simmons to be competent and that he had knowingly and intelligently waived his rights to appeal, thereafter the Arkansas Supreme Court made its review, and determined that Simmons was competent and that he knowingly and intelligently waived his rights to appeal, but more particularly thereafter, Federal District Judge G. Thomas Eisele ordered Mr. Simmons to undergo additional psychiatrict evaluation at a federal institution and ordered a court clerk to prepare a complete transcript of the entire trial record and appointed attorney John Wesley Hall as an expert on constitutional criminal law, to review the entire record and meet with and counsel with Simmons to personally advise him independently of his rights to appeal and the grounds therefor, and his federal habeas corpus rights. Thereafter, Attorney Hall filed a very extensive seventy-four page report to advise respondent Simmons on appealable issues in his May 1988 death sentence, and nowhere in that report is there any finding of ineffective assistance of counsel, and Mr. Simmons has never asserted any ineffective assistance of counsel, and neither Federal District Judge G. Thomas Eisele, nor the Arkansas Supreme Court, nor the trial court below has ever found any basis for ineffective assistance of counsel.

In *Simmons v. State of Arkansas*, 766 S.W.2d 423 (Ark. 1989), the Arkansas Supreme Court stated in its per curiam order:

> The trial judge and petitioner's (Simmons') counsel performed an exceptional job in examining and exploring the petitioner's capacity to understand the choice between life and death and his ability to know and to intelligently waive any and all rights he might have in an appeal of his sentence. In addition, petitioner's counsel thoroughly discussed seven possible points that could be argued for reversal on appeal, and petitioner responded by stating he understood those points and that he rejected all encouragement and suggestions to appeal.

In *Lenhard v. Wolff*, 603 F2d 91 (1979), the Court held that court-appointed counsel had no standing as an accused's next friend to file petition for writ of habeas corpus and application for stay of execution of sentence imposed on accused in the absence of some showing that accused lacked capacity to pursue relief in federal court; and, in *Hamblin v. State of Florida*, 527 So.2d 800 (1988), the court held:

> Hamblin had a constitutional right to represent himself, and he was clearly competent to do so. To permit counsel to take a position contrary to his wishes through the vehicle of guardian ad litem would violate the dictates of *Faretta*. In the field of criminal law, there is no doubt that "death is different," but, in the final analysis, all competent defendants have a right to control their own destinies.

"Generally, there is no constitutional right to appeal a conviction." See *McCain v. Durston*, 153 U.S. 684 (1894). This cited authority appears in the recent case of *Murray v. Giarratano*, ___ U.S. ___ (88-411, June 23, 1989). Therefore, if there is presently no constitutional right to appeal a conviction, how can there be a constitutional prohibition against waiving an appeal?

II

WHETHER A THIRD PARTY HAS STANDING TO ASSERT THE CONSTITUTIONAL RIGHTS WHEN THE PARTY DIRECTLY AFFECTED DOES NOT ASSERT THE RIGHT?

Petitioner Whitmore does not have standing on any of the traditional grounds, and he has failed to even allege grounds for standing. Instead, he asks this Court to grant an exception and relax the requirements for standing so that the Court may address what petitioner characterizes as the abridgement of societal rights, and to remedy this, he says this Court should grant standing to any citizen. To this, respondent Simmons would argue that in the first place, societal rights are not being abridged, but are being served in this case. Secondly, the petitioner has no standing in this matter; and thirdly, citizens generally should not be able to acquire standing as next friend or otherwise in cases of this nature, unless some bases exist for their claims. To relax the standards as requested by the petitioner would be to enlarge the jurisdiction of this Court in direct violation of Article Three of the United States Constitution. And if petitioner Whitmore were granted standing in this case, the Court would be opening the door to allow any citizen in every capital case to intervene and thwart the workings of the Court by claiming next friend status.

Also, to grant petitioner next friend status in the Simmons case, this Court would clearly have to overrule the findings in the Gilmore case, because even the petitioner cites the Gilmore case as being controlling authority on the question of standing. In *Gilmore*, Mr. Chief Justice, writing for the majority stated:

> When the application for a stay was initially filed on December 2, a serious question was presented as to whether Bessie Gilmore had standing to seek the requested relief or any relief from this Court. Assuming the Court would otherwise have jurisdiction with respect to a "next friend" application, that jurisdiction would arise only if it were demonstrated that Gary Mark Gilmore is unable to seek relief in his own behalf. See *Rosenberg v. United States*, 346 U.S. 273, 291, 97 L.Ed. 1607, 73 S. Ct. 1152 (1953) (separate opinion of Jackson, J., joined by five Members of the Court). However, in view of Gary Mark Gilmore's response on December 8, 1976, it is now clear that the "next friend" concept is wholly inapplicable to this case. Since Gary Mark Gilmore has now filed a response and appeared in his own behalf, through his retained attorneys, any basis for the standing of Bessie Gilmore to seek relief in his behalf is necessarily eliminated.

Petitioner also claims to be a citizen of the State of Arkansas, but offers no proof on this point other than the allegation that he is presently confined on death row in Arkansas prisons. Respondent Simmons would contend that petitioner Whitmore is not a citizen of the State of Arkansas, and where petitioner Whitmore claims to have standing to assert a constitutional violation as it directly involves rights afforded to him by the State of Arkansas and his interest to have the Simmons case in the data base for comparative review in his death penalty case, respondent Simmons would contend that petitioner Whitmore has already had his case affirmed on direct appeal (*Whitmore v. State*, 296 Ark. 308 756 S.W.2d 890 [1988]), and further, has had his Rule 37 petition denied (*Whitmore v. State*, 299 Ark. 55 [1989]). Also see *Pulley v. Harris*, 465 U.S. 37, 79 L.Ed.2d 29, 104 S. Ct. 871 (1984), where this Court held:

> There is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it. Indeed, to so hold

would effectively overrule *Jurek* and would substantially depart from the sense of *Gregg* and *Proffitt*. We are not persuaded that the Eighth Amendment requires us to take that course.

Quoting from Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?* 54 S. Cal. Law Review, 575 (1981):

> Although next friend proceedings have been specifically approved in cases of infancy, incompetency, or lack of time, the death row inmate's desire to be executed, coupled with his refusal to appeal, cannot alone confer standing upon a next friend that a party would not ordinarily have under recognized principles. A showing of the capital defendant's incompetence must be made. (See *Gilmore*) . . .
>
> When the date of execution is imminent, next friends will usually be successful in obtaining temporary stays of execution, pending a determination of the defendant's competency and ability to represent his own interests. Such a stay, however, will not be continued after the condemned prisoner has been found competent to waive appellate review of his death sentence. (Citing *Lenhard v. Wolff*), Pp. 584, 585.

Next friends will usually be successful in obtaining TEMPORARY STAYS OF EXECUTION, and here lies the problem for the death row inmate, the state, society, victims of crime, and the public generally who believe in the fair and expeditious enforcement of capital punishment. In the past, not by law, but by practical application, a temporary stay has been virtually automatic upon the request of anybody claiming, rightly or wrongly, next friend status, and with the apparently endless cycle of appellate litigation on capital

cases, a temporary stay can easily translate into a decade or more, but the worst evil of this procedure has never been addressed, and probably never will, because it is always a moot question. The question is, "What remedy, if any, does a death row inmate have when his constitutional rights are violated by some interloper claiming next friend status?" Clearly, petitioner Whitmore could not have taken Simmons' car or any of his property, liberty, or life, without due process of law under the Fifth Amendment of the United States Constitution. Due process of law is generally considered to be notice and a reasonable opportunity to be heard before the action is taken against you. In every instance in this case where the court has granted a stay of execution, first the Arkansas Supreme Court; second Federal District Court; third the Eighth Circuit Court of Appeals; and fourth the U.S. Supreme Court; each and every time this was done to Mr. Simmons without any notice to Mr. Simmons, and without any opportunity for him or his attorneys to be heard on the question, and as a direct result of these unwanted stays of execution being granted, this has caused Mr. Simmons by his own admission to suffer unnecessarily in clear violation of his Eighth Amendment rights against cruel and unusual punishment. Each and every time Mr. Simmons attempted to complain about this in the court processes below, it was always disregarded as a moot question because the stay had already been granted. Surely now, before this Court of last resort, this Court will take cognizance of respondent Simmons' complaint about the violations of his constitutional rights as inflicted by petitioner Whitmore and others who have wrongfully characterized themselves as "next friends". There is precedent for a court addressing what would otherwise be classified as a moot question. *In re Estate of Brooks*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965), in this "landmark case upholding a patient's right to refuse treatment on religious grounds, Mrs. Brooks, a Jehovah's Witness, refused to accept blood transfusions necessary for her survival on the ground that the tenets of her faith forbade such procedures.

Although transfusions had already been administered pursuant to the trial court's order, the Supreme Court of Illinois still chose to consider the issues involved as they were of substantial public interest. In condemning the trial court's action as a clear violation of the patient's religious freedom, the Illinois Supreme Court distinguished *Brooks* from other cases in which the state's interest in protecting the life of an unborn child, as well as in safeguarding the health and welfare of minor children, were sufficiently compelling to justify forced transfusions. Mrs. Brooks was not pregnant, had no minor children to care for, and did not, by her actions, present any 'clear and present danger' to society's welfare."

Respondent Simmons respectfully asks this Court to address this question in the case before it.

In *Rosenberg v. United States*, 346 U.S. 273 (1953),

> A total stranger to Julius and Ethel Rosenberg filed a next friend petition for stay of execution of the defendants' death sentences, which was temporarily granted. Justice Jackson, in a concurring opinion, discussed the potential for abuse inherent in next friend standing:
>
> "Every lawyer familiar with the workings of our criminal courts . . . will agree that this precedent presents a threat to orderly and responsible representation of accused persons and the right of themselves and their counsel to control their own cases. . . . That such disorderly intervention is more likely to prejudice than to help the representation of accused persons in highly publicized cases is self evident. We discountenance this practice."

In the present case, petitioner Whitmore has no standing to intervene, and this Court therefore is lacking in jurisdiction. And the question of mandatory appeal was decided in *Gilmore*

thirteen years ago, and it has never been overruled. Allowing a prisoner some degree of autonomy and dignity and personal choice in these matters is not against society's interest but in furtherance of it. Therefore, petitioner's request should be denied.

CONCLUSION

For the reasons and authorities cited above, the decision of the Arkansas Supreme Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John Harris, hereby certify that the annexed Brief for the Respondent Ronald Gene Simmons, Sr., has been timely filed, pursuant to Rules 30 and 35 of the Rules of this Court by sending a copy via first class mail, postage pre-paid, addressed to the Clerk of this Court.

I further certify that I served the said Brief on Petitioner by placing a copy in the United States Mail, postage prepaid, to: Arthur L. Allen, Attorney at Law, Allen & O'Hern, First Commercial Building, 400 West Capitol, Suite 1700, Little Rock, AR 72201; and that I served the said Brief on Respondent State of Arkansas by placing a copy in the United States Mail, postage prepaid, to: The Hon. Steve Clark, Attorney General of Arkansas, Tower Building, Suite 200, Fourth & Center Streets, Little Rock, Arkansas 72201, on the 22nd day of September, 1989.

/s/ John Harris
Attorney for Respondent
Ronald Gene Simmons, Sr.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JUDAH H. WHITMORE, INDIVIDUALLY AND AS NEXT FRIEND OF RONALD GENE SIMMONS ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

RONALD GENE SIMMONS, SR. ..... *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT THE STATE OF ARKANSAS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-7146

.....

JONAS H. WHITMORE, INDIVIDUALLY
AND AS NEXT FRIEND OF
RONALD GENE SIMMONS ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

RONALD GENE SIMMONS, SR. ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT THE STATE OF ARKANSAS

JURISDICTION

This Court has no jurisdiction to enter a judgment in favor of petitioner Whitmore because Whitmore cannot satisfy the "case or controversy" requirement of Article III, §2 of the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in pertinent part:

"[n]or cruel and unusual punishment inflicted."

Article III, §2 of the United States Constitution provides in pertinent part:

"[t]he judicial power shall extend to all cases, in law and equity, arising under this Constitution, . . ."

STATEMENT OF THE CASE

On December 28, 1987, Ronald Gene Simmons went on a murderous rampage in the town of Russellville, Arkansas. Within approximately 30 minutes at four different locations in Russellville, Simmons shot at six people with a .22 caliber pistol. Of the six intended victims, Simmons actually shot five, of whom two died as a result of their wounds. After Russellville Police Officers arrested Simmons, the Pope County Sheriff's Department searched Simmons' house, located at Dover, Arkansas, on the afternoon of December 28, 1987, and continued to search the next day, December 29, 1987. In the course of this search, the Deputy Sheriffs discovered bodies of fourteen members of Simmons' family. All had been murdered. Five of the victims were found in Simmons' house. Seven were buried in a shallow grave near the house. Two victims, infants, were found in the trunks of two junk automobiles located near the house.

On the basis of all these killings, the State of Arkansas filed two sets of criminal charges against Simmons. Simmons was tried for the Russellville crimes in May of 1988 in Franklin County Circuit Court (hereinafter *Simmons* I). Subsequently, in February of 1989, Simmons was tried in Johnson County Circuit Court for the murders of the fourteen members of his family whose bodies were discovered on December 28-29 (hereinafter *Simmons* II). The result of both trials was the same. A jury found Simmons guilty of capital murder and sentenced him to die.

With respect to *Simmons* I, Simmons made known to the trial court that he did not wish to directly appeal to the Arkansas Supreme Court the validity of his conviction for capital murder. On May 16, 1988, the Franklin County Circuit Court heard expert testimony concerning Simmons' mental competence to make a voluntary waiver of his right to a direct

appeal to the Arkansas Supreme Court. After hearing this expert testimony, the trial court found that Simmons was sufficiently mentally competent to voluntarily waive his right to a direct appeal. The correctness of this finding of fact by the Franklin County Circuit Court was challenged by Rev. Louis Franz, who filed with the trial court a petition requesting permission to prosecute a direct appeal on Simmons' behalf to the Arkansas Supreme Court as Simmons' next friend. Reverend Franz had no connection to Simmons or to the crimes that were the subject of *Simmons* I. On December 17, 1988, the Franklin County Circuit Court held a second hearing in order to determine Simmons' mental competence to waive a direct appeal to the Arkansas Supreme Court. After hearing additional expert testimony at this hearing, the Franklin County Circuit Court found that Simmons was sufficiently mentally competent to waive his right to a direct appeal to the Arkansas Supreme Court.

Reverend Franz carried his fight to intervene in *Simmons* I on behalf of Simmons as next friend to the Arkansas Supreme Court. On June 20, 1988, at the request of Reverend Franz, the Arkansas Supreme Court stayed Simmons' execution and ordered Franz and the State to submit briefs addressing four issues: (1) whether there should be a mandatory direct appeal to the Arkansas Supreme Court in death penalty cases; (2) if such a direct appeal is not required by the Eighth Amendment of the United States Constitution or by Arkansas Rules of Criminal Procedure, whether the Arkansas Supreme Court should review Ronald Gene Simmons' right to waive a direct appeal to the Arkansas Supreme Court; (3) assuming that the Arkansas Supreme Court does decide to review Ronald Gene Simmons' waiver of his right to a direct appeal, whether Simmons was sufficiently mentally competent to make a voluntary waiver of his right to a direct appeal to the Arkansas Supreme Court; and (4) whether Reverend Franz had standing as next friend to assert Simmons' right to a direct appeal to the Arkansas

Supreme Court. *Franz v. State*, 296 Ark. 111, 751 S.W.2d 355 (1988). After reviewing the briefs submitted by the parties and transcripts of the two competency hearings that were held by the Franklin County Circuit Court, the Arkansas Supreme Court issued an opinion in which it held that Reverend Franz did not have standing to assert, as next friend, Simmons' right to a direct appeal to the Arkansas Supreme Court and that neither the Eighth Amendment to the United States Constitution nor any Arkansas case law or rule of procedure required that there *must* be a direct appeal in a case where a defendant has received the death penalty. *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988). (J.A. 4-28).

After this loss at the Arkansas Supreme Court, Franz next tried the United States District Court for the Eastern District of Arkansas as a forum from which he could intervene in *Simmons* I to prosecute a direct appeal on Simmons' behalf to the Arkansas Supreme Court. The United States District Court for the Eastern District of Arkansas ordered yet additional briefs, had Simmons examined at the Medical Center for Federal Prisoners in Springfield, Missouri, and had an independent counsel prepare a lengthy report in order to advise Simmons as to whether there were any reversible errors that occurred in *Simmons* I, including ineffective assistance of trial counsel. The District Court eventually held that Simmons was sufficiently mentally competent to waive his right to a direct appeal to the Arkansas Supreme Court and, therefore, Reverend Franz had no standing as next friend to assert Simmons' right to a direct appeal. *Franz v. Lockhart*, 700 F.Supp. 1005 (E.D. Ark. 1988). In *Franz*, the District Court also held that the Eighth Amendment to the United States Constitution requires that there be at least one review by an appellate court before a state may impose on a defendant the penalty of death. Franz has appealed to the United States Eighth Circuit Court of Appeals the District Court's denial of his petition seeking a writ of habeas corpus as next friend of

Simmons. This appeal is now on the Eighth Circuit's docket as *Franz v. Lockhart*, No. 89-1485EA. The Eighth Circuit has stayed *Franz v. Lockhart* pending this Court's decision in the instant case.

With respect to *Simmons* II (the instant case), on March 1, 1989, the Johnson County Circuit Court held an evidentiary hearing in order to determine whether Simmons was sufficiently mentally competent to waive his right to a direct appeal to the Arkansas Supreme Court of his conviction of capital murder and death sentence imposed for murdering 14 members of his family. The Johnson County Circuit Court reviewed the information in its file from *Simmons* I concerning Simmons' mental competence, heard additional testimony from Simmons and then found that Simmons was sufficiently mentally competent in order to waive his right to a direct appeal. The Arkansas Supreme Court affirmed this finding of fact on March 10, 1989 in *Simmons v. State*, 298 Ark. 193, 766 S.W.2d 422. (J.A. 29-31). Three days later, on March 13, 1989, Jonas Whitmore, petitioner in the instant case, filed a motion to intervene in *Simmons* II with the Arkansas Supreme Court. (J.A. 32-33). In this motion to intervene, Whitmore asserted that he should be allowed to do so as Simmons' next friend and also in order to protect his own rights and those of other Arkansas death row inmates, present and future. The Arkansas Supreme Court denied Whitmore's motion to intervene on the same day in *Simmons v. State*, 298 Ark. 255, 766 S.W.2d 423. (J.A. 34).

At this point, the death sentence that Simmons had received in *Simmons* II was to be carried out on March 15, 1989. After the Arkansas Supreme Court denied his motion to intervene, Whitmore petitioned this Court, as next friend of Ronald Gene Simmons, to stay the March 15, 1989 execution. In an order dated March 15, 1989, this Court *did* stay the execution that had been set for March 15, 1989 and ordered that

the stay remain in effect pending Whitmore's filing of a petition seeking a writ of certiorari to the Arkansas Supreme Court. This Court granted Whitmore's petition for a writ of certiorari to review the Arkansas Supreme Court's denial of his petition to intervene on July 3, 1989.

SUMMARY OF THE ARGUMENT

With respect to the first issue presented in this case, whether the Eighth Amendment requires that Ronald Gene Simmons directly appeal his capital murder conviction and death sentence to the Arkansas Supreme Court, respondent the State of Arkansas asserts that the Eighth Amendment does not require such an appeal, given the structure of Arkansas' death penalty sentencing process. In several cases, this Court has held that there is no one correct procedure for the states to employ in capital punishment cases. *See, e.g., Spaziano v. Florida*, 468 U.S. 447, 464-65 (1984). When this Court considers the Eighth Amendment sufficiency of a state's capital punishment sentencing procedure, this Court considers the procedure as a whole. *Pulley v. Harris*, 465 U.S. 37, 45 (1984). The State of Arkansas respectfully submits that its capital punishment sentencing procedure, when considered as a distinct whole, satisfies the Eighth Amendment's requirement that death sentences be imposed in a manner that is not fundamentally arbitrary, capricious or freakishly random. The following features of Arkansas' death penalty sentencing procedure, when considered as a whole, satisfy the Eighth Amendment: (1) a defendant can be sentenced to death only by a jury; (2) death penalty cases in Arkansas are bifurcated into a guilt/innocence phase; (3) the State is limited in the sentencing phase to proof of eight statutory aggravating circumstances and, moreover, the State must abide by the rules of evidence in proving its aggravating circumstances; (4) these aggravating circumstances have been facially approved by this Court in *Gregg v. Georgia*, 428 U.S. 153 (1976); (5) in the sentencing phase of an Arkansas capital trial the defendant is allowed to introduce a very wide range of mitigating evidence and is not constrained by the rules of evidence in putting in his proof; (6) in order to impose the death sentence an Arkansas jury must unanimously find in writing that the State's aggravating circumstances exist beyond a reasonable doubt, that these

aggravating circumstances outweigh beyond a reasonable doubt any of the defendant's mitigating circumstances that are found to exist and the jury must decide that the aggravating circumstances justify a sentence of death beyond a reasonable doubt; and (7) Arkansas trial judges are ". . . vested with broad powers to check the arbitrary, capricious, wanton or freakish imposition of death sentences by a jury." *Collins v. State*, 261 Ark. 195, 206, 548 S.W.2d 106, 113, *cert. denied*, 464 U.S. 878, *reh. denied*, 434 U.S. 977 (1977).

Respondent the State of Arkansas respectfully submits that this Court should not reach the Eighth Amendment issue present in this case because Whitmore lacks standing to argue to this Court that the Eighth Amendment requires a direct appeal to the Arkansas Supreme Court of Ronald Gene Simmons' capital murder conviction and death sentence. Whitmore has no connection to Simmons but for the fact that he, like Simmons, is a citizen of the State of Arkansas and is also an inmate on Arkansas' death row. Whitmore lacks standing because he cannot satisfy the "case or controversy" jurisdiction requirement of Article III, §2 of the United States Constitution. Whitmore cannot satisfy the "case or controversy" requirement of Article III, §2 because he cannot show that he has personally suffered from some actual or threatened injury as a result of Arkansas' refusal to mandate a direct appeal by Ronald Gene Simmons of his capital murder conviction and death sentence to the Arkansas Supreme Court. Whitmore cannot show any actual or threatened injury because he has already had an unsuccessful direct appeal to the Arkansas Supreme Court of his own capital murder conviction and resulting death sentence. Whitmore's contentions that he will suffer if Simmons' case is not put into the pool of Arkansas death penalty cases that the Arkansas Supreme Court examines when it undertakes comparative review of death penalty cases is entirely speculative. Whitmore has not made any showing that there is even the remotest possibility that his own capital

murder conviction and death sentence will be reversed at any time in the future. Given that Whitmore has no standing to assert that Ronald Gene Simmons must directly appeal his capital murder conviction and death sentence to the Arkansas Supreme Court because he cannot satisfy the "case or controversy" requirement of Article III, §2, respondent the State of Arkansas respectfully submits that the instant case is identical to *Gilmore v. Utah*, 429 U.S. 1012 (1976) and should be controlled by *Gilmore*.

ARGUMENT

I.

WHETHER THE EIGHTH AMENDMENT'S BAN AGAINST CRUEL AND UNUSUAL PUNISHMENT REQUIRES MANDATORY APPELLATE REVIEW IN ALL CASES IN WHICH THE DEATH PENALTY IS IMPOSED.

According to petitioner Whitmore, the substantive issue presented in this case is whether the Eighth Amendment's prohibition against cruel and unusual punishment mandates a direct appeal of all capital murder convictions and resulting death sentences. Respondent the State of Arkansas, disagrees with Whitmore's framing of the Eighth Amendment issue. The Eighth Amendment issue presented in this case is not whether, as an abstract matter, the Eighth Amendment requires a direct appeal of all capital murder convictions and resulting death sentences. The Eighth Amendment issue, properly framed, is whether Arkansas' capital sentencing procedure is so deficient that a mandatory direct appeal to the Arkansas Supreme Court is necessary to prevent the arbitrary and capricious imposition of death sentences by Arkansas juries following Arkansas' capital sentencing procedure.

As this Court has repeatedly held, the core of the Eighth Amendment's limitation on the ability of a state to impose the penalty of death on a particular defendant is the Eighth Amendment's requirement that death sentences be imposed in a manner that is not arbitrary, capricious or freakishly random. *See, e.g., Franklin v. Lynaugh*, 108 S. Ct. 2320, 2331 (1988) (plurality opinion); *Maynard v. Cartwright*, 108 S. Ct. 1853, 1858-59 (1988); *Booth v. Maryland*, 482 U.S. 496, 502 (1987); and *California v. Brown*, 479 U.S. 538, 541 (1987). In order to determine whether a state's capital punishment sentencing process measures up to this Eighth Amendment

requirement, this Court reviews the capital sentencing procedure at issue as a distinct whole. In *Pulley v. Harris*, 465 U.S. 37 (1984) this Court held:

> [w]e do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed on these general lines would inevitably satisfy the concerns of *Furman*, for each distinct system must be examined on an individual basis. *Id.* at 45 (quoting *Gregg v. Georgia*, 428 U.S. 153, 195 [1976]).

If Arkansas' capital sentencing procedure is considered as a whole, then it is not *necessarily* violative of the Eighth Amendment because it lacks the feature of a mandatory direct appeal to the Arkansas Supreme Court. In addition, this Court held in *Pulley* that a capital punishment sentencing procedure is not violative of the Eighth Amendment if it produces on occasion "aberrational outcomes." Instead, this Court held that a particular capital sentencing procedure is violative of the Eighth Amendment if it suffers from such "systemic defects" that the system produces death penalties in a manner that is arbitrary, capricious or freakishly random. *Pulley* at 54. Moreover, this Court has repeatedly recognized that there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death." *Johnson v. Mississippi*, 108 S. Ct. 1981, 1986 (1988); *Pulley, supra* at 54; *Zant v. Stephens*, 462 U.S. 862, 884-85, 904 (1983) and *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion).

Is Arkansas' death penalty sentencing procedure such that without the feature of a mandatory direct appeal to the Arkansas Supreme Court the procedure allows death penalties to be imposed in the manner that is fundamentally arbitrary and capricious? Arkansas notes at the outset that this Court has repeatedly identified appellate review as an important component, for Eighth Amendment purposes, of a state's capital punishment sentencing process. In *Murray v. Giarratano*, 109 S. Ct. 2765, 2771 (1989) this Court held that ". . . direct appeal is the primary avenue for review of capital cases. . . ." *Id.* at 2771. In a number of cases this Court or a plurality of the Court has stated that appellate review is an important component of a State capital punishment sentencing process because such review serves as a safeguard against the arbitrary or capricious imposition of the death penalty. *Murray*, at 2777 n.11 (dissenting opinion); *McCleskey v. Kemp*, 481 U.S. 279, 303 (1987); *Zant v. Stephens*, 462 U.S. 862, 876 (1983); *Gregg v. Georgia*, 428 U.S. 153, 198, 204-06, 211 (1976); *Proffitt v. Florida*, 428 U.S. 242, 250-51, 253, 258-59 (1976); *Jurek v. Texas*, 428 U.S. 262, 269, 276 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976); and *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976); *see also* Pascucci, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 Cornell L. Rev. 1129, 1188-98 (1984); Goodpaster, *Judicial Review of Death Sentences*, 74 Jour. of Crim. L. and Criminology 786 (1983); and Dix, *Appellate Review of the Decision to Impose Death*, 68 Geo. L. J. 97, 106-09 (1979). Moreover, it is the case that almost all of the 37 states that have the death penalty have statutory provisions for mandatory review of a capital defendant's conviction of capital murder and also of his death sentence. *See* U.S. Dept. of Justice, Bureau of Justice Statistics, Bull., *Capital Punishment 1987* at 5 (July 1988) and Carter, *Maintaining Systemic Integrity in Capital Cases: the Use of Court-Appointed Counsel to Present Mitigating Evidence when the Defendant Advocates Death*, 55 Tenn. L. Rev. 95, 114-16 (1987). The two lower courts that have specifically considered whether Arkansas' capital punishment sentencing process violates the Eighth Amendment because it lacks the feature of the mandatory appeal have disagreed. In *Collins v. State*, 261 Ark. 195, 204-11, 548 S.W.2d 106, 111-13, *cert. denied*, 434 U.S. 878, *reh. denied*, 434 U.S. 977 (1977) and again in *Franz v. State*, 296 Ark. 181, 186-88, 754 S.W.2d 839,

842-43 (1988) (*Simmons* I) the Arkansas Supreme Court held that the absence of a mandatory direct appeal was not a "make or break" feature of Arkansas' death penalty sentencing procedure. In so holding, the Arkansas Supreme Court relied primarily on this Court's decision in *Gilmore v. Utah*, 429 U.S. 1012 (1976). In both these cases a majority of the Arkansas Supreme Court held:

> [t]he idea that in *Gregg*, *Proffitt*, and *Jurek*, the United States Supreme Court has held that there must be a mandatory or automatic appeal from the imposition of the death penalty by a state trial court seems to have crumbled with the recent actions of the court in *Gilmore v. State of Utah*, 429 U.S. 1012, 97 S. Ct. 436, 50 L.Ed.2d 632 (1976), in which, on December 13, 1976, that court found that Gary Mark Gilmore, who had been sentenced to death, made a knowing and intelligent waiver of any and all federal rights he might have had. In a concurring opinion by the Chief Justice and Mr. Justice Powell, it is clearly pointed out that Gilmore had waived his right of appeal under state law, and the history of that waiver is recited. True enough, the order of the United States Supreme Court (White, Brennan, Marshall and Blackmun dissenting) does not specifically refer to this waiver. It does, however, state:
>
> > ***that the State's determinations of his competence knowingly and intelligently to waive any and all such rights were firmly grounded.
>
> If the Constitution of the United States requires that a state provide a mandatory appeal in such cases, we do not see how there can be a knowing and intelligent waiver of "any and all federal rights" when there has been no appeal from the state trial court's judgment imposing the death sentence. In any event, the Stewart plurality has said

> that it had no intention to suggest that the procedures approved in *Gregg* would be the only ones permissible under *Furman* or that a system constructed on these general lines would inevitably satisfy *Furman;* but that each system must be examined on an individual basis. *Gregg v. Georgia, supra. Collins* at 205-06, 548 S.W.2d at 112.

The United States District Court for the Eastern District of Arkansas reached the opposite conclusion in *Franz v. Lockhart*, 700 F.Supp. 1005, 1012-24 (E.D. Ark 1988) (*Simmons* I).

In order for this Court to evaluate the Eighth Amendment sufficiency of Arkansas' capital punishment sentencing procedure, the Court should consider the several components of the process. Arkansas' death penalty sentencing procedure is set forth in Ark. Code Ann. §§5-4-601—08 (1987). Aside from the absence of a mandatory appeal, Arkansas' death penalty sentencing procedure is virtually identical to the state procedures that were approved by this Court in *Gregg v. Georgia*, 428 U.S. 153 (1976) and *Proffitt v. Florida*, 428 U.S. 242 (1976).[1] Study of *Collins, supra* and Ark. Code Ann. §§5-4-601—08 reveals the following features of Arkansas' death penalty sentencing procedure that insure that death sentences will not be imposed in Arkansas in a manner that is fundamentally

[1] A defendant sentenced to death in Arkansas may directly appeal his capital murder conviction and death sentence to the Arkansas Supreme Court if he chooses to do so. Pursuant to Arkansas Rule of Criminal Procedure 36.24, Arkansas Supreme Court Rule 11(f) and Ark. Code Ann. §16-91-113(a) (1987), when a condemned defendant appeals his capital murder conviction and sentence to the Arkansas Supreme Court the court will review all of the trial court's rulings that were adverse to the defendant, whether or not the defendant advances the adverse rulings as an issue on appeal. This comprehensive review by the Arkansas Supreme Court is not, however, a review for plain error. *See Parker v. State*, 292 Ark. 421, 436, 731 S.W.2d 756, 764 (1987) and *Fretwell v. State*, 289 Ark. 91, 98, 708 S.W.2d 630, 634 (1986).

arbitrary, capricious or freakishly random. Initially, Arkansas notes that defendants in Arkansas criminal trial courts cannot receive the death penalty unless they are tried and sentenced by a jury. (Ark. Code Ann. §5-4-608). Moreover, the capital defendant's jury trial is bifurcated into a guilt/innocence phase that is held prior to a separate sentencing phase. [Ark. Code Ann. §5-4-602(3)]. In this sentencing phase the jury must unanimously make three findings of fact, in writing: (1) the jury must find that at least one of eight statutory aggravating circumstances exists beyond a reasonable doubt; (2) the jury must find that the aggravating circumstance or circumstances outweigh beyond a reasonable doubt *all* mitigating circumstances found to exist; and (3) the jury must find that the aggravating circumstance or circumstances justify a sentence of death beyond a reasonable doubt. [Ark. Code Ann. §5-4-603~~(a)~~)]. This weighing of aggravating circumstances against mitigating circumstances is not required by the Eighth Amendment. *Zant v. Stephens*, 462 U.S. 862, 875-76 n.13 (1983). At this sentencing hearing the State is limited to proof of only the eight statutory aggravating circumstances (Ark. Code Ann. §5-4-604) and the State must comply with the rules of evidence in order to prove its aggravating circumstances [Ark. Code Ann. §5-4-602(4)]. The State's aggravating circumstances have been approved by this Court in *Gregg*, *supra* and *Proffitt*, *supra*. In contradistinction to the State, the capital defendant in Arkansas is permitted to offer to the jury a very wide range of evidence in mitigation and the defendant is not constrained by the rules of evidence in putting forth his case in mitigation [Ark. Code Ann. §5-4-602(4) and Ark. Code Ann. §5-4-605]. The defendant has no burden of proof to satisfy in establishing his mitigating circumstances. Most importantly, Arkansas trial judges have ". . . broad powers to check the arbitrary, capricious, wanton or freakish imposition of the death sentence by a jury." *Collins* at 206-10, 548 S.W.2d at 113-15. Arkansas respectfully submits that these features of this death penalty sentencing process, particularly its requirement that aggravating circumstances exist beyond a reasonable doubt,

that they outweigh beyond a reasonable doubt any evidence going to mitigation and that they justify a sentence of death beyond a reasonable doubt, when considered as a whole insure that defendants will not be sentenced to death in Arkansas in a manner that is fundamentally arbitrary, capricious or freakishly random. These features of Arkansas' death penalty sentencing process considered as a whole ". . . are a far cry from the major systemic defects identified in *Furman*." *Pulley v. Harris* at 54.

Arkansas acknowledges that the feature of a mandatory direct appeal would provide an additional measure of reliability with respect to the imposition of death sentences only on those defendants who truly deserve to die as punishment for having committed the offense of murder. However, this Court has never interpreted the Eighth Amendment prohibition against cruel and unusual punishment to require meticulous exactitude in the imposition of the death penalty. *Pulley v. Harris* at 54. Since its landmark decision in *Furman v. Georgia*, 408 U.S. 238 (1972) this Court had interpreted the Eighth Amendment's prohibition against cruel and unusual punishment to require only that death sentences be imposed in a manner that is not fundamentally arbitrary, capricious or freakishly random. The features of Arkansas' death penalty sentencing procedure noted above insure that Arkansas juries will impose death sentences, when they choose to do so, in a manner that meets the Eighth Amendment's standard. It is true that most of the other states that have a death penalty provision do have some sort of mandatory appellate review. However, this Court has held that the Eighth Amendment *does not* require absolute symmetry among the states with respect to their death penalty procedures. *See Spaziano v. Florida*, 468 U.S. 447, 464 (1984).

In *Spaziano* this Court held that the Eighth Amendment does not forbid a judge from overriding a jury's recom-

mendation of a sentence of life imprisonment and sentencing a defendant in a capital case to death. In reaching this decision in *Spaziano* this Court held:

> [t]he fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws. *Id.* at 464.

It is true that this Court has frequently made use of ". . . evolving standards of decency that mark the progress of a maturing society" [*Trop v. Dulles*, 356 U.S. 86, 101 (1958)] to determine whether a particular death sentence imposed on a defendant was violative of the Eighth Amendment. Furthermore, it is true that this Court determines the content of these "evolving standards of decency" by considering the content of state statutes. *Penry v. Lynaugh*, 109 S. Ct. 2934, 2953 (1989) and *Stanford v. Kentucky*, 109 S. Ct. 2969, 2974-77, 2982 (1989). Examination of the cases in which this Court has expressly made use of the "evolving standards" analysis to determine Eighth Amendment issues demonstrates that the "evolving standards" analysis is employed to determine whether the death penalty is a proportional punishment for certain kinds of criminal offenses or a proportional punishment for certain classes of defendants. *See, e.g., Tison v. Arizona*, 481 U.S. 137, 152-55 (1987) (Eighth Amendment does not forbid imposition of death on felony murderers who do not actually kill the victim, but act with reckless indifference to human life in the course of a felony in which someone is killed); *Ford v. Wainwright*, 477 U.S. 399, 406-09 (1986) (Eighth Amendment forbids imposition of the death penalty on inmates who become insane while on death row); and *Coker v. Georgia*, 433 U.S. 584, 593-97 (1977) (plurality opinion) (Eighth Amendment forbids imposition of the death penalty for the criminal offense of rape). As this Court's holding in *Spaziano* indicates, the *procedure* that a state uses to impose the death penalty, as opposed to the *substance* of the offense for which the death penalty is imposed or the kind of defendant on which the death penalty is imposed, is not violative of the Eighth Amendment mercly because the procedure is not followed in majority of states that have the death penalty.

II.

WHETHER PETITIONER WHITMORE HAS STANDING TO ASSERT THE CONSTITUTIONAL RIGHTS OF THE GENUINE PARTY AT INTEREST, RONALD GENE SIMMONS, AFTER SIMMONS HAS MADE A KNOWING AND INTELLIGENT DECISION TO WAIVE ASSERTION OF HIS OWN RIGHTS.

Petitioner Whitmore asserts that he should have standing to argue that the Eighth Amendment requires that there be a direct appeal of Ronald Gene Simmons' capital murder conviction and death sentence to the Arkansas Supreme Court. Respondent the State of Arkansas respectfully submits that Whitmore has no standing to assert this claim. Whitmore has no such standing because he cannot satisfy the "case or controversy" requirement of Article III, §2 of the United States Constitution.

In his brief Whitmore fails to demonstrate that he has any direct connection to Simmons or to Simmons' conviction and sentence of death except for the fact that Whitmore, like Simmons, is a citizen of the State of Arkansas and is an inmate on Arkansas' death row. This Court has repeatedly held that third parties, not otherwise connected with a particular legal controversy, who step forward to claim the right to assert the legal rights of genuine parties at interest have no standing to

do so. This Court has consistently held that "champions" such as Whitmore lack standing to assert the rights of genuine parties at interest because they cannot satisfy the "case or controversy" requirement of Article III, §2 of the United States Constitution. This Court has consistently held that a would-be plaintiff has standing to vindicate the constitutional rights of genuine parties at interest if: (1) the would-be plaintiff shows that he has personally suffered some actual or threatened injury as a result of the allegedly illegal conduct of the defendant; (2) the would-be plaintiff must show that the injury fairly can be traced to the challenged conduct of the defendant; and (3) the would-be plaintiff must show that the injury is likely to be redressed by a favorable decision. *See Caplin and Drysdale v. United States*, 109 S. Ct. 2646, 2651 n.3 (1989); *Allen v. Wright*, 468 U.S. 737, 750-52 (1984); *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 472-6 (1982); *Singleton v. Wulff*, 428 U.S. 106, 112 (1976); and *O'Shea v. Littleton*, 414 U.S. 488, 493-4 (1974); *see also* 13 Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* §3531.4—.6 (2d ed. 1984).

In his brief Whitmore fails to explain how it is that *he* will suffer some *actual* injury if Simmons does not challenge the validity of his capital murder conviction and death sentence by filing a direct appeal with the Arkansas Supreme Court. In truth, Whitmore cannot do so. Whitmore *has had* a direct appeal of *his* capital murder conviction and death sentence. *Whitmore v. State*, 296 Ark. 308, 756 S.W.2d 890 (1988). Moreover, Whitmore has received post-conviction review from the Arkansas Supreme Court. *Whitmore v. State*, 299 Ark. 55, 771 S.W.2d 266 (1989). Given that the Arkansas Supreme Court has reviewed Whitmore's capital murder conviction and death sentence on direct appeal and again on post-conviction review, any constitutional defect in Arkansas' death penalty sentencing procedure that exists because of the absence of a mandatory direct appeal to the Arkansas Supreme Court will have no actual effect on Whitmore.

In his brief Whitmore seems to allege that the capital murder that he committed will not seem so bad, by way of comparative review by the Arkansas Supreme Court, to the murders that Simmons committed. According to Whitmore, this fact is sufficient to actually injure him if the Arkansas Supreme Court does not review Simmons' capital murder conviction and death sentence because the Arkansas Supreme Court ordinarily does conduct comparative review of death sentences.[2] This assertion of an actual injury by Whitmore is entirely speculative. Whitmore's argument in this regard depends upon his capital murder conviction and death sentence, which the Arkansas Supreme Court has already affirmed, being reversed and remanded at some indefinite period in the future by some state or federal court. Whitmore has completely failed to allege in his brief that there is even a *remote* possibility that his own capital murder conviction and death sentence will be reversed at any time in the future. It is only if Whitmore's sentence and conviction are reversed that he would be able to minimize the reprehensibility of the murder that he committed by comparing it to the murders that Simmons committed. Until Whitmore can demonstrate some possibility that his conviction or sentence could be reversed and that he could face the death penalty a second time, his "compared-to-Simmons-I-don't-look-so-bad" argument is too speculative to warrant the conclusion that Whitmore will suffer some actual injury if the Arkansas Supreme Court does not conduct a direct review of Simmons' capital murder

[2]The Arkansas Supreme Court has committed itself to comparative review of death sentences imposed by Arkansas juries in order to make certain that each death penalty imposed by an Arkansas jury was not the product of arbitrariness or capriciousness. *See Ruiz v. State*, 280 Ark. 190, 655 S.W.2d 441 (1983). In determining that the death penalty was a proportional punishment for the murder that Whitmore committed, the Arkansas Supreme Court took note of the fact that Whitmore, in the course of a robbery, stabbed his victim ten times, cut her throat and carved an "X" mark on the side of her face. *Whitmore, supra* at 317, 756 S.W.2d at 895.

conviction and death sentence. Not only is Whitmore's "compared-to-Simmons-I-don't-look-so-bad" argument too speculative to serve as an actual injury to Whitmore, but it also proves too much as a logical matter. If Whitmore has standing to argue that Simmons' case should be in the pool of Arkansas death row cases for comparative review purposes, does Whitmore also have standing to intervene in the post-conviction efforts of other death row inmates with "more" heinous murders than his in order to resist their challenges to their capital murder convictions and death sentences? Would Whitmore have standing to intervene to assist death row inmates with "marginally" heinous murders to their credit in order to help them remove themselves from death row? Surely Whitmore does not have standing to intervene in post-conviction proceedings brought by Arkansas death row inmates in order to further his own interests by keeping the "more" heinous murderers on death row and by assisting the "less" heinous murderers to exit Arkansas' death row by attacking their capital murder convictions and sentences in post-conviction proceedings.

Whitmore could evade the Article III bar to his championing of Simmons' right to a direct appeal if Whitmore could demonstrate that he was Simmons' next friend. After reading Whitmore's brief, it appears to respondent the State of Arkansas that Whitmore has abandoned any effort to persuade this Court that he is the next friend, or should be, of Ronald Gene Simmons.

Whitmore attempts to evade the Article III bar to his lack of standing by arguing that there should be some sort of generalized "public interest" exception in cases such as the instant case where vindication of Eighth Amendment values in death penalty cases is at stake. This argument overlooks the Article III basis of standing. This Court has squarely held that it has no authority to, of itself, ignore the Article III, §2 "case or

controversy" limitation on its jurisdiction in the name of "public interest." *Allen v. Wright, supra* and *Gilmore v. Utah*, 429 U.S. 1012, *reh. denied*, 429 U.S. 1030 (1976); *see also* Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 Wisc. L. Rev. 37, 47, 54 (1984) and Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983). Even in death penalty cases, this Court recognizes the Article III, §2 "case or controversy" limitation on its jurisdiction. *Gilmore, supra; see also Valley Forge Christian College, supra* at 489-90 n.26 ("[w]ere we to recognize standing premised on an 'injury' consisting solely of an alleged violation of a 'personal constitutional right' to a government that does not establish religion" *id.* at 265, "a principled consistency would dictate recognition of respondents' standing to challenge execution of every capital sentence on the basis of a personal right to a government that does not impose cruel and unusual punishment. . . .") and Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 Harv. L. Rev. 297, 312-13 (1979) (Prof. Brilmayer observes that if *Gilmore* had founded standing on "societal interest," then "the standing doctrine would have to fall."). In this respect, the instant case is identical to *Gilmore* and should be controlled by it.

CONCLUSION

Respondent the State of Arkansas, respectfully requests that this Honorable Court affirm the decision of the Arkansas Supreme Court in *Simmons v. State*, 298 Ark. 255, 766 S.W.2d 423 (1989).

Respectfully submitted,

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No. 88-7146

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In The

Supreme Court of the United States

October Term, 1989

JONAS H. WHITMORE,
Individually and as "Next Friend"
of RONALD GENE SIMMONS,

Petitioner,

vs.

STATE OF ARKANSAS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF OF AMICI CURIAE BY THE STATE OF MISSOURI, joined by the States of ALABAMA, IDAHO, NEW MEXICO, OHIO, SOUTH CAROLINA and VIRGINIA

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QUESTIONS PRESENTED

I.

WHETHER THE EIGHTH AMENDMENT'S BAN AGAINST CRUEL AND UNUSUAL PUNISHMENT REQUIRES A MANDATORY APPELLATE REVIEW IN ALL CASES IN WHICH THE DEATH PENALTY IS IMPOSED?

II.

WHETHER A THIRD PARTY HAS STANDING TO ASSERT THE VIOLATION OF CONSTITUTIONAL RIGHTS WHEN THE PARTY DIRECTLY AFFECTED DOES NOT ASSERT THE RIGHT? (AMICI WILL ADDRESS ONLY THIS QUESTION.)

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INTEREST OF AMICI CURIAE

The states listed in the Appendix, by and through their respective Attorneys General, respectfully offer this brief as *amici curiae* in support of the position of the respondents in this cause. Since 1976, there have been fourteen "voluntary executions" which is over ten percent of the total number of executions. *See*, LDF, Death Row, U.S.A. 6-8 (July, 1989). All of the states joining in this brief have had, do have or may have in the future death-row inmates in state or federal court who wish to forego litigation. These states have had or will have people who oppose the death penalty attempt to litigate on behalf of those inmates.

The precise issue raised in the present cause either has arisen or may arise in all of these states. For this reason, amici have a substantial and continuing interest in the cases such as the one at bar.

SUMMARY OF THE ARGUMENT

Since *Gilmore v. Utah*, 429 U.S. 1012 (1976), the federal courts have periodically been asked to decide whether intervenors who want to litigate on behalf of inmates who wish to abandon appeals have standing to litigate on behalf of those death-row inmates. Petitioner Whitmore suggests that he has standing to litigate the present petition for writ of certiorari on an "individual standing" theory and "third-party standing" theory. Whitmore, however, fails to demonstrate either form of standing. Since Whitmore suffers no injury-in-fact from Simmons' execution, he has no individual standing. Further,

Whitmore has no third-party standing since he does not show why Simmons cannot assert his own rights. Accordingly, this Court has no jurisdiction under Article III since there is no "case or controversy" before the Court. Finally, the judgment of the Arkansas Supreme Court rests on an adequate and independent state ground. Even if Whitmore has standing before the federal court under Article III, he had no standing in state court as a matter of state law.

ARGUMENT

In this brief, amici wish to speak only to the second question presented by Whitmore. Since *Gregg v. Georgia*, 428 U.S. 153 (1976), there have been fourteen "voluntary executions." *See*, LDF, Death Row, U.S.A. 6-8 (July, 1989). These executions have created almost as much litigation as nonvoluntary executions. *See, e.g., Gilmore v. Utah*, 429 U.S. 1012 (1976); *Rumbaugh v. Procunier*, 753 F.2d 395 (5th Cir.), *cert. denied*, 473 U.S. 919 (1985). There is also much "next-friend" litigation that does not result in execution. *See, e.g., Smith ex rel. Missouri Public Defender Commission v. Armontrout*, 812 F.2d 1050 (8th Cir.), *cert. denied*, 107 S.Ct. 3277 (1987); *Weber v. Garza*, 570 F.2d 511 (1978); *Groseclose ex rel. Harries v. Dutton*, 594 F.Supp. 949 (M.D. Tenn. 1984). The issue of standing for one to proceed on behalf of a death-row litigant who wishes to abandon litigation has been or may be the subject matter of litigation involving amici.

Although Whitmore articulates and treats the standing issue as a secondary question, amici believe that it is

not a secondary issue, but rather, a threshold question that implicates this Court's Article III "case or controversy" jurisdiction. *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968). If the Article III jurisdictional standard is met, there remains the issue of whether the Court should hear the suit "as a prudential matter." *Singleton v. Wulff*, 428 U.S. 106, 112 (1976). If Whitmore has no standing before this Court, then the judgment of the Arkansas Supreme Court should be affirmed.

I. Whitmore cannot demonstrate that he has "next-friend," individual or third-party standing.

Whitmore's belief that standing is a secondary issue is reflected in his presentation of this issue to this Court. Before discussing Whitmore's imprecision in presenting the issue, it is necessary to discuss the difference between individual standing, "next-friend" standing and third-party standing.

Individual standing concerns the ability of Whitmore, as an individual, to challenge the lawfulness of Arkansas's capital procedure. Under individual standing, Whitmore is not asserting Simmons' constitutional rights. Rather, Whitmore attempts to assert his own personal challenge to the lawfulness of the Arkansas procedure due to an alleged injury to him from that procedure as applied to Simmons. An example of this individual standing was asserted but rejected in *Wilson v. Lane*, 870 F.2d 1250, 1254-1256 (7th Cir. 1989), *cert. pending*, No. 89-81 (U.S.). *See also, Franz v. Lockhart*, 700 F.Supp. 1005, 1010 (E.D.Ark. 1988), *appealed*, No. 89-1485EA (8th Cir.).

This Court recognized "next friend" standing with federal habeas corpus litigation in *Rees v. Peyton*, 384 U.S. 312 (1966). That form of standing is statutorily authorized by the Congress. 28 U.S.C. § 2242. With "next friend" standing, the "next friend" asserts the real party-in-interest's rights due to an inability of the real party-in-interest (the prisoner) to assert those rights for himself. In the habeas corpus litigation, that inability is usually litigated in the form of whether the prisoner is competent to litigate in his own behalf. *See, Lenhard v. Wolff*, 443 U.S. 1306, 1308 (1979) (Rehnquist, J., opinion in chambers); *Evans v. Bennett*, 440 U.S. 1301 (1979) (Rehnquist, J., opinion in chambers); *Smith ex rel. Missouri Public Defender Commission v. Armontrout*, 812 F.2d at 1050. In these "next friend" habeas corpus litigations, the "next friend" wishes to step into the shoes of the offender and litigate claims for the offender, subject to defenses asserted by the State.

Finally, Whitmore attempts to assert the rights of Simmons under a third-party standing theory (Brief, pp. 22-25). To assert third-party standing, Whitmore must show an injury-in-fact to himself from Simmons' failure to appeal and that it is prudential to allow Whitmore to proceed, *i.e.*, that Simmons is incapable of asserting his own rights. *Singleton v. Wulff*, 428 U.S. at 114, 116.

A. Whitmore alleges only individual and third-party standing, not "next-friend" standing.

Although the present case is styled "Jonas H. Whitmore, individually and as 'next friend' of Ronald Gene Simmons v. State of Arkansas," amici believe that the

standing issue is factually more complex than the mere caption of the present case. Accordingly, amici will trace the development of the present standing issue before the Arkansas Supreme Court and this Court. From this discussion, amici believe that it will become clear that Whitmore is asserting only individual and third-party standing before this Court.

Before the Arkansas Supreme Court, Whitmore, without gracing that court with any explanation, sought permission to proceed as Simmons' "next friend" (Joint Appendix – hereinafter "J.A." – at p. 32, para. 2) and asserted one theory of individual standing:

> Petitioner Jonas H. Whitmore is an interested party in that certain protected rights for both he [sic] and other present and future death row inmates are dependent upon further appellate review in behalf of Ronald Gene Simmons.

[J.A. p. 33, para. 5.] Whitmore did not assert a third-party standing theory (J.A. 32-33). The Arkansas Supreme Court denied the request to intervene due to Whitmore's lack of standing on March 13, 1989 (J.A. 34).

The petition for writ of certiorari to the Supreme Court of Arkansas made clear that the only judgment Whitmore wanted reviewed was the "judgment and opinion of the Supreme Court of Arkansas entered in this proceeding on March 13, 1989, in which Whitmore was denied the right to intervene in [sic] behalf of Ronald Gene Simmons, an Arkansas inmate scheduled to die by lethal injection" (Petition for Certiorari – hereinafter "P.C." – at p. 1). Whitmore did not request the petition for certiorari to extend to the March 10, 1989 *per curiam*

opinion of the Arkansas Supreme Court (J.A. 29). Whitmore did not assert that he had "next friend" standing to proceed on behalf of Simmons (P.C. pp. 8-10). Likewise, in the opening brief, Whitmore fails to assert that he has "next friend" standing to proceed on behalf of Simmons (Brief pp. 20-25). The only theories of standing asserted to this Court are individual standing and third-party standing (P.C. pp. 8-10; Brief pp. 20-25). Whitmore's decision not to assert "next friend" standing is reasonable in light of *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988), and *Franz v. Lockhart*, 700 F.Supp. at 1005. Issues concerning the limitation of *Rees v. Peyton*, 384 U.S. at 312, are not before the Court.

B. Whitmore does not have individual standing or third-party standing to assert a petition for writ of certiorari from Simmons' conviction.

Whitmore asserts that he has individual standing to assert the present petition for writ of certiorari (Br. pp. 20-22). Whitmore also imports a variety of theories from civil law to support his third-party standing contention (Br. pp. 22-25). These civil-law theories of standing have never been applied by this Court to one's standing to assert a petition for writ of certiorari from a criminal direct appeal on behalf of another. Since none of Whitmore's theories is well founded, Whitmore's request should be denied.

1. Whitmore has no individual standing.

Initially, Whitmore recognizes that the federal courts do not consider "generalized grievances about the conduct of government" (Brief, p. 21, *quoting, Flast v. Cohen*, 392 U.S. at 106). Whitmore, however, goes on to assert such a generalized grievance (Brief, p. 21). Whitmore alleges that he is entitled to assert the "public interest protections of the Eighth Amendment" (Brief, p. 21). Of course, this is the type of generalized grievance that is insufficient to convey individual standing to Whitmore. Even one who feels strongly that another's rights are being ignored may not rely on the strength of feeling or sincerity of that conviction as a foundation for federal jurisdiction.

> Plaintiffs in the federal courts "must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." . . . There must be a "personal stake in the outcome" such as to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." . . . Abstract injury is not enough. It must be alleged that the plaintiff "has sustained or is immediately in danger of sustaining some direct injury" as a result of . . . official conduct.

O'Shea v. Littleton, 414 U.S. 488, 494 (1974) (citations omitted).

Whitmore refers the Court to no case that recognizes such a "public interest protection" aspect to the Eighth Amendment (Brief, p. 21). That is because the Eighth Amendment's protections are not a salve for the public's

conscience concerning capital punishment. Rather, the Eighth Amendment protections are purely personal to the individual. Further, such a standard for individualized standing would allow "all other citizens of the state" (Brief, p. 21) to file certiorari petitions asserting a "public-interest protection" of the Eighth Amendment. The concept of "citizen standing" was rejected by this Court in *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 482-487 (1982). The anomaly of that theory would be illustrated if "citizens" were to file documents encouraging the courts to execute Simmons or waiving the purported public-interest protection. As should be apparent, problems arise where multiple "citizens" approach the Court. Further, problems would arise where the criminal defendant *and* "citizens" approach the court. Recognition of such a theory of standing would be unworkable at best, unconstitutional at worst.

Whitmore also asserts that he

> has a direct and substantial interest in having the data base against which his crime is compared to be complete and to not be [sic] arbitrarily skewed by the omission of any other capital case.

[Brief, p. 21.] Although Whitmore does not grace the Court with an explanation of this sentence, amici assume that Whitmore is asserting that his proportionality review will not be accurate without inclusion of Simmons' crimes into the pool of comparative information (P.C. p. 10). This assertion ignores the fact that Whitmore's proportionality review has been completed by the Arkansas

Supreme Court, which affirmed Whitmore's death sentence. The Arkansas Supreme Court was persuaded that the multiple stabbing, the slicing of the throat and the engraving of an "X" into his victim's face thoroughly justified the circuit court's verdict of the death penalty. *Whitmore v. State*, 296 Ark. 308, 756 S.W.2d 890, 895 (1988). Whitmore's concern that Simmons' information will not be available for proportionality review is moot.

Perhaps, Whitmore speculates that some future court will reverse his conviction or sentence of death and Simmons' information will not be available for proportionality review of Whitmore if he is reconvicted and resentenced to the death penalty (P.C. p. 10). Such analysis is speculative and is hardly the foundation for an Article III "case or controversy." "The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' " *O'Shea v. Littleton*, 414 U.S. at 494 (citations omitted); *see, Franz v. Lockhart*, 700 F.Supp. at 1010 (describing "injury" as too tenuous and contingent to confer standing). Further, amici note that Whitmore offers no reason why he cannot bring this purported flaw to the attention of the Arkansas Supreme Court in the unlikely event this scenario occurs.

Finally, amici note that the truth of Whitmore's argument would show a motive for him to sabotage an appeal brought on Simmons' behalf. Whitmore would want to paint Simmons as the most evil killer ever to live in the State of Arkansas. By painting Simmons in a bad light, Whitmore enhances the possibility that his own slaughter will be reviewed favorably to that of Simmons by a future Arkansas Supreme Court. Article III requires a case or controversy between parties. There appears to be none

between Whitmore and the State of Arkansas in the Simmons case as defined by the Constitution and this Court.

Whitmore next asserts that the Court should not enforce the standing requirement. Whitmore's rationale is that standing should be considered only a "rule of practice" (Brief, p. 21). Whitmore's argument is grounded in misperception. The standing requirement is grounded in this Court's Article III "case or controversy" requirement. The standing doctrine has jurisdictional underpinnings. *See, Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). Once the minimum Article III standing requirement is met, there remains a standing requirement based on principles of prudence. *Id.; Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. at 474-475. Whitmore points to no case from this Court suggesting that there is an exception to the Article III standing requirement.

Whitmore grounds his suggested exception on the Eighth Amendment. That rationale is insufficient to create an exception to Article III.

> Implicit in the foregoing is the philosophy that the business of the federal courts is correcting constitutional errors, and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. This philosophy has no place in our constitutional scheme. It does not become more palatable when the underlying merits concern the Establishment Clause.

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. at 489. There is no

principled method to limit exceptions to standing to certain constitutional provisions. *See, id.* at 489-490. Whitmore also suggests that if he has no standing, then a constitutional violation will go unredressed (Brief, p. 25). "This view would convert standing into a requirement that must be observed only when satisfied." *Id.* at 489.

2. Whitmore is not entitled to third-party standing.

Whitmore asserts that he is entitled to assert Simmons' rights under a third-party standing theory (Brief, pp. 23-25). Generally, third parties have no standing to assert claims on behalf of another. *See, Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. at 473; *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). An exception to this general rule exists. Initially, a third party like Whitmore must demonstrate a relationship between himself and the person whose rights he seeks to assert (Simmons).

> The first [element] is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Further, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter.

Singleton v. Wulff, 428 U.S. 106, 115 (1976). Amici find it significant that Whitmore fails to allege to the Arkansas

Supreme Court and this Court a relationship between Whitmore and Simmons. Whitmore fails to describe how he will enjoy vindication of Simmons' right. In fact, as discussed earlier (Amicus Brief, *supra* at p. 8), it might not be in Whitmore's interest to assert rights consistent with Simmons' rights. Whitmore might be interested in making Simmons look bad in order for Whitmore to look better in the unlikely event the Arkansas Supreme Court has to conduct another proportionality review.

Second, Whitmore fails to assert any reason for Simmons not to assert his own right before this Court.

> Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the person who is in court becomes[,] by default[,] the right's best available proponent.

Id. at 115-116. Simmons was and is his own best proponent. He was certainly available to vindicate his own rights before the Arkansas Supreme Court. He is available to present his position to this Court. This is best manifested by his presentation of his own amicus curiae brief. There is no "genuine obstacle" to Simmons' assertion of his own rights. He could have easily ratified the appeal to the Arkansas Supreme Court or to this Court. Considerations of privacy, *Singleton v. Wulff*, 428 U.S. at 117; imminent mootness, *id.*; fear of prosecution, *Craig v. Boren*, 429 U.S. 190, 196-197 (1976); or "chilled" expression, *Secretary of State of Maryland v. Joseph H. Munson Co.*,

467 U.S. 947, 956 (1984), do not apply here. No genuine obstacle barred Simmons from his direct appeal.

If the Court were to find that Whitmore has standing to assert the Eighth Amendment claim presented in question number one, it cannot be on the basis of third-party standing. If Whitmore wishes to assume Simmons' rights, he must also assume Simmons' responsibilities. Simmons made a knowing and intelligent decision to waive his right to a direct appeal (J.A. 31). Since Whitmore wishes to assume Simmons' rights, he must also assume Simmons' responsibilities – the knowing and intelligent waiver of the direct appeal. Whitmore asserts that Simmons cannot waive the Eighth Amendment claim because it is a "public right" (Brief, p. 18). Of course, if that assertion were true, then Simmons has no private right to assert, and no private right to be assumed by Whitmore under a third-party standing theory.

C. Supreme Court review of the Eighth Amendment claim is precluded by an adequate and independent state ground.

On March 13, 1989, the Arkansas Supreme Court found that Whitmore "has failed to show that he has standing to intervene in this cause" (J.A. 34). The Arkansas Supreme Court found, as a matter of Arkansas state law, that Whitmore was not entitled to intervene in the state-court proceeding. That decision constitutes a short and plain statement of an adequate and independent state ground supporting the judgment of the Arkansas Supreme Court. *See, Michigan v. Long*, 463 U.S. 1032 (1983).

District Judge Eisele noted the state-law nature of the 1988 Arkansas Supreme Court's ruling when he wrote:

> Petitioner Franz's claim that he has standing under the Arkansas Constitution to prosecute these issues in Arkansas state court was rejected by the Arkansas Supreme Court, and in any case could not avail him before this Court, because he must meet federal, not state, standing requirements.

Franz v. Lockhart, 700 F.Supp. at 1010. Indeed, the Arkansas Supreme Court noted the criticism of the federal "next-friend" standing standard and instituted a less stringent standard for "next-friend" standing in Arkansas (J.A. 12). Whitmore, however, failed to satisfy that lesser standard. Since the Arkansas Supreme Court relied upon the adequate and independent state ground – Whitmore's lack of standing to proceed under Arkansas law – the judgment of the Arkansas Supreme Court should be affirmed. *Cf. id.* at 1010 n. 1.

CONCLUSION

The concepts of standing: "next friend," individual and third-party, in death-penalty litigation have been the subject of controversy over the past twelve years. The Court should take the opportunity presented in the present case and provide guidance for the lower courts.

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No. 88-7146 (10)

IN THE
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OCTOBER TERM, 1989

JONAS H. WHITMORE, INDIVIDUALLY AND AS NEXT FRIEND OF RONALD GENE SIMMONS,
Petitioner,
v.
STATE OF ARKANSAS, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION, PATRICK J. McNULTY, SR., MARJORIE McNULTY, PARENTS OF MURDERED CHILDREN, AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Pursuant to Rule 36.3 of the rules of this Court, *amici* respectfully move for leave to file the attached brief *amici curiae* in support of respondent. Respondent has consented to the filing of this brief. Petitioner has not.

The Washington Legal Foundation (WLF) is a national non-profit public interest law and policy center with more than 120,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, it also devotes a substantial amount

of its resources to promoting victims' rights and criminal justice reform. In 1981, WLF published a "Crime Victims Impact Statement" manual to serve as a model guide for implementation at the state level of the use of victim impact information. WLF works with other victims' rights groups, including the *amici* in this case.

Over the last eight years, WLF has also appeared as *amicus curiae* in many death penalty cases before this Court and lower federal courts. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104 (1982); *McCleskey v. Kemp*, 481 U.S. 279 (1987). WLF also filed *amicus curiae* briefs in the district courts in the Walker spy ring cases, and participated in oral argument in *United States v. Whitworth*, No. CR 85-552 JV (N.D. Cal. 1985), arguing that the federal death penalty for espionage can be constitutionally applied since the federal sentencing procedures meet applicable constitutional requirements.

Amici Patrick J. McNulty, Sr. and Marjorie McNulty are the relatives of four of the fourteen victims murdered by Ronald Gene Simmons. Their son, Dennis R. McNulty, was married to Sheila, the daughter of Ronald Gene Simmons. On December 26, 1987, Dennis drove his wife and their two children, Sylvia, age 6, and Michael, age 21 months, to the Simmons household. Sheila entered the house carrying Michael and put him down by the Christmas tree. Simmons then shot her six times in the head. Dennis, hearing the shots, ran into the house and was shot in the head. Sylvia fled to a bedroom where Simmons strangled her to death with a cord. Michael, too young to flee, was also strangled, and then stuffed in a garbage bag.

The McNultys believe that the death penalty is an appropriate punishment for these murders of their son, daughter-in-law, and grandchildren. They petition the courts not to lose sight of the fact that capital cases involve crushing, irreparable injury for the victims' families as well as the victims themselves. While our legal system remembers the murderer's name in the caption of the case, victims and their families all too often are forgotten. The McNultys further believe that it is an injustice that while the murderer of their loved ones is willing to receive his just punishment, another murderer is attempting to delay the imposition of that sentence and to prevent them from closing this brutal chapter in their lives.

Parents of Murdered Children (POMC), founded by the parents of Lisa Hullinger, who was murdered in 1978, is a national non-profit, self-help support organization based in Cincinnati, Ohio, with chapters nationwide. Besides providing support for grieving parents and family members, POMC provides information about the criminal justice system, and seeks to make the system responsive to the needs of the victim's family.

The Allied Educational Foundation (AEF) is a non-profit, charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus* before this Court on a number of occasions.

All of the above-named *amici* wish to present a broader perspective on the issues in this case than that offered by the parties. *Amici* believe that their experiences with crime and with the criminal justice system provide a valuable perspective in this case. In particular, *amici* wish to emphasize that our criminal justice system is built on the premises of individual autonomy and individual responsibility and that capital punishment is a communal, moral judgment with deep roots in American law.

For the foregoing reasons, *amici* are in a unique position to aid the Court in its consideration of the issues presented, and their interests are both substantial and different from those of the parties. Accordingly, *amici*

respectfully request that their motion for leave to file an *amici curiae* brief in support of respondent be granted.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Amendment requires mandatory appellate review of all capital sentences, including those where the capital defendant voluntarily and competently elects not to pursue an appeal?

2. Whether an unrelated third party, who has himself suffered no distinct injury, has standing to allege a violation of constitutional rights when the party most directly affected by the alleged violation elects not to assert those rights?

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BRIEF OF WASHINGTON LEGAL FOUNDATION, PATRICK J. McNULTY, SR., MARJORIE McNULTY, PARENTS OF MURDERED CHILDREN, AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI CURIAE*

The interests of the *amici curiae* are set out fully in the Motion for Leave to File accompanying this brief.

SUMMARY OF ARGUMENT

This case presents the question whether the Eighth Amendment requires mandatory appellate review of a capital sentence. As we show below, there is nothing in the Bill of Rights that forces mandatory appellate review upon a capital defendant who voluntarily and competently chooses not to seek it.

Principles of individual autonomy and individual responsibility provide the very foundation of our Republic. "[W]hatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice." *Faretta v. California*, 422 U.S. 806, 833-34 (1975). Consistent with this bedrock principle, the American system of criminal justice has long afforded defendants the freedom—and the responsibility—to make their own decisions about such fundamental issues as pleading guilty and waiving rights to counsel, jury trial, or habeas review.

It would be wholly inconsistent with these basic American values to invoke the Bill of Rights as the basis for dictating mandatory appellate review of capital sentences. Indeed, the Eighth Amendment, like the Constitution's other historic guarantees of personal liberty, was designed to *protect*—not *prohibit*—individual autonomy and freedom. A constitutional requirement of mandatory appellate review would stand the Bill of Rights on its head, turning it from a charter of individual liberties into an instrument of governmental coercion. This Court has long and wisely refused to countenance such a result: "What were contrived [by the Framers] as protections for the accused should not be turned into fetters." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279-80 (1942). Especially is this so where a capital defendant—whose other freedoms are necessarily subject to the most exacting governmental constraints—makes the intensely personal decision to accept his sentence. "To deny him that would be to incarcerate his spirit—the one thing that remains free and which the state need not and should not imprison." *Lenhard v. Wolff*, 603 F.2d 91, 94 (9th Cir. 1979) (Sneed, J., concurring).

Beyond this, a constitutional requirement of mandatory appellate review would frustrate important State interests, while providing little if any enhancement in the reliability of the capital sentencing process. Both the

State of Arkansas and the families of murder victims have an overriding concern in seeing that criminal punishments are carried out in a prompt and efficient fashion and that the tragic events surrounding murders are finally put to rest. *Barefoot v. Estelle*, 463 U.S. 880, 887-88 (1983); *Lenhard v. Wolff*, 443 U.S. 1306, 1307 (1979) (Rehnquist, J., in chambers). And the State has an equally powerful interest in acknowledging a capital defendant's remorse and his willingness to stand and accept society's punishment. There is nothing in the Eighth Amendment that forbids a state from permitting a waiver of appellate review in order to accommodate what one capital defendant termed his wish to redeem his "last vestige of dignity." *People v. Deere*, 41 Cal. 3d 353, 710 P.2d 925, 929, 222 Cal. Rptr. 13 (1985). As Ronald Gene Simmons said in this case, "I want no action that will delay, deny, defer or denounce this very correct and proper death sentence. . . . [I]n my particular case anything short of death would be cruel and unusual punishment. . . . I only ask for what I deserve." *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839, 844 (1988).

At the same time, permitting waivers of appellate review does not appreciably impair the reliability of capital sentencing. Most importantly, Mr. Simmons' capital sentence was imposed pursuant to an Arkansas statute that afforded all of the trial and sentencing phase protections that this Court found significant in *Gregg v. Georgia*, 428 U.S. 153 (1976), and its subsequent Eighth Amendment decisions. Mandatory appellate review of every capital sentence might theoretically enhance the reliability of the capital sentencing process. But the value of any such enhancement would at best be marginal and uncertain, and clearly would not justify a constitutional requirement of mandatory appellate review.

Initially, the need for mandatory appellate review must be seen in the context of the long-established rule that there is no general constitutional requirement of appel-

late review in criminal cases and this Court's repeated recognition that there is "no perfect procedure for deciding in which cases governmental authority should be used to impose death." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). Moreover, both commentators and this Court have repeatedly recognized that appellate review of a capital sentence is of inherently limited effectiveness. This is in part because the decision to impose death is ultimately a moral, communal judgment and in part because such decisions rest on consideration of innumerable factors and are not easily susceptible to appellate review. And finally, the likelihood that appellate review will enhance sentencing "reliability" is especially remote in cases like this, where the defendant freely accepts the trial court's sentence and opposes "his" defense counsel.

In the light of all this, it should be clear that the Eighth Amendment does not require a State—and a capital defendant—to forego the significant benefits flowing from waivers of appellate review in exchange for the marginal and uncertain enhancement in reliability offered by mandatory appellate review. Perhaps because the constitutional justifications for the Arkansas capital-sentencing process are so clear, petitioner places principal reliance upon the supposed fact that 36 out of 37 States have rejected Arkansas' approach to waivers of appellate review.

This Court has never accorded significant weight to the mechanical tallying of State laws in the context of Eighth Amendment *procedural safeguards*. This sort of analysis has been confined to cases involving the *substantive restrictions* imposed by the Eighth Amendment. The Court's differing treatment has properly reflected its comparatively greater expertise and competence in the field of procedural fairness and regularity. Nor should the Court undertake any tally of State statutes in this case. Arkansas has adopted an approach to waivers of appellate

review that is not merely fair and reasonable, but which is *more* deferential to individual autonomy than other available approaches. In these circumstances, it would be unprecedented, and troubling, to hold that the entrenched protections in the Bill of Rights for individual freedoms have somehow been superseded by a poll of the statutes currently prevailing in a majority of the several States.

Finally, petitioner Whitmore has failed to advance any colorable claim to standing in this case. The personal injury that Whitmore allegedly suffered because Simmons' crimes were excluded from Arkansas' comparative review process is entirely speculative. And Whitmore's argument that the Court should allow him standing simply because of the societal importance of this case is plainly foreclosed by this Court's precedent. Nor should this Court allow Whitmore standing based on "next friend" or third-party standing theories. Article III's standing requirement would be frustrated by a rule allowing self-appointed next friends to litigate on behalf of competent capital defendants who voluntarily accept their sentences.

I. PERMITTING VOLUNTARY AND COMPETENT WAIVERS OF APPELLATE REVIEW OF CAPITAL SENTENCES DOES NOT VIOLATE THE EIGHTH AMENDMENT.

A. Requiring Mandatory Appellate Review of Capital Sentences Is Inconsistent with Fundamental Notions of Individual Autonomy Embodied in the Bill of Rights.

Principles of individual autonomy, and hence individual responsibility, provide the very basis for both our Constitution and our most cherished social and political institutions. As the Court has observed, "whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the ines-

timable worth of free choice."[1] Or in Justice Harlan's words, "[o]ur Nation [is] built upon postulates of respect for the liberty of the individual."[2]

These historic principles of individual autonomy and responsibility provide the primary rationale for allowing waivers of rights by criminal defendants in countless different contexts.[3] As one commentator has observed, "[d]uring the course of a criminal adjudication, the defendant can be found to have waived virtually any of the procedural protections provided for his benefit."[4] Thus, the Court has held that the Sixth Amendment "does not force a lawyer upon a defendant," reasoning that "[w]hat were contrived [by the Framers] as protections

[1] *Faretta v. California*, 422 U.S. 806, 833 (1975); *Whitney v. California*, 274 U.S. 357, 375 (1927) ("Those who won our independence . . .valued liberty both as an end and as a means.").

[2] *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). *See also Hebert v. Louisiana*, 272 U.S. 312, 316 (1926) ("fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . ").

[3] *See* Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 Tex. L. Rev. 193, 219 (1977) ("an important aspect—perhaps the essence—of the dignity of the individual is his ability to control his own destiny"); Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. Rev. 478, 488-89 & n.55 (1981) ("a waiver is a choice"); Dix, *Waiver as an Independent Aspect of Criminal Procedure: Some Comments on Professor Westen's Suggestion*, 1979 Ariz. St. L.J. 67, 76-77; Westen, *Away From Waiver: A Rationale For the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214, 1255 (1977) ("waiver is thought to be based . . . on a concept of free choice"). *See also Adams v. United States ex rel. McCann*, 317 U.S. 269, 276-80 (1942); *Faretta* 422 U.S. at 834 n.45 ("Freedom of choice is not a stranger to the constitutional design of procedural protections for a defendant in a criminal proceeding.").

[4] Rubin, *supra* at 478. *See also* ABA, *Standards for Criminal Justice, The Defense Function Standard* 4-3.1(b) & 4-5.2 (Approved 1979); ABA, *Model Code of Professional Responsibility* EC 7-7 (1979); ABA, *Model Rules of Professional Conduct* Rule 1.2 (1983).

for the accused should not be turned into fetters."[5] Similarly, it is well-established that the Constitution does not prohibit a defendant—including a capital defendant—from pleading guilty.[6] And nothing in the Constitution forbids waivers—including in capital cases—of Fourth Amendment rights,[7] Fifth Amendment rights,[8] the right to a jury trial,[9] the right to confront one's accus-

[5] *E.g., Adams*, 317 U.S. at 279. *See also Carter v. Illinois*, 329 U.S. 173, 174-175 (1946); *Faretta*, 422 U.S. at 807.

[6] *E.g.*, Fed. R. Crim. P. 11; *Corbitt v. New Jersey*, 439 U.S. 212, 225 n.15 (1978); *Blackledge v. Allison*, 431 U.S. 63, 71 (1977).

The Court has repeatedly emphasized the wide discretion of the States to permit (or forbid) the making of guilty pleas. Thus, in *North Carolina v. Alford*, 400 U.S. 25, 37-39 (1970), the Court held that the validity of a voluntary and competent guilty plea could not be "seriously questioned," even where the defendant professed belief in his innocence. The *Alford* Court relied on the fact that the defendant, while claiming innocence, also provided a factual basis for his plea. *Id.* at 38.

Petitioner's reliance upon *Alford's* reference to a factual basis for a guilty plea is misplaced. First, it is by no means clear that *Alford's* observation about a factual basis amounts to a constitutional requirement. Second, and more importantly, any analogous "factual basis" requirement for waivers of appellate review of capital sentences is plainly satisfied in this case. After all, an Arkansas sentencing jury and trial judge pronounced defendant's sentence following a presumptively valid proceeding pursuant to a constitutional capital sentencing scheme. *See infra* pp. 15-16. And, of course, the defendant himself has clearly endorsed this judgment. *See also* White, *Defendants Who Elect Execution*, 48 U. Pitt. L. Rev. 853, 864-65 (1987).

[7] *E.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

[8] *E.g., Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

[9] This Court has squarely held that the Sixth Amendment does not itself forbid waiver of a jury trial by a criminal defendant. *See Adams*, 317 U.S. at 277-78; *Patton v. United States*, 281 U.S. 276 (1930). Indeed, this result has long been established notwithstanding the literal language of Article III, § 2, cl. 3 that "The Trial of all Crimes, except in Cases of Impeachment, *shall* be by

ers,[10] or the right to habeas review.[11]

Although there are instances in which particular *statutes* or *rules* restrict waivers of particular rights by criminal defendants, it would be unprecedented to interpret the *Bill of Rights* to deny a defendant the otherwise available freedom to waive a procedural protection. The Bill of Rights was adopted as a charter of liberties, designed to guarantee individual freedoms against governmental intrusion. As Justice Douglas once observed, "[t]he struggle for liberty has been a struggle against Government. The essential scheme of our Constitution and Bill of Rights was to take Government off the backs of people." [12]

The Bill of Rights has never been thought to provide a mechanism for compelling individuals to act in the in-

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Jury." U.S. Const. art. III, § 2, cl. 3 (emphasis added). *See also Duncan v. Louisiana*, 391 U.S. 145, 158 (1968).

Petitioner mistakenly relies upon *Singer v. United States*, 380 U.S. 24 (1965), in arguing that the Constitution forbids various waivers by criminal defendants. In *Singer*, the Court reasoned that nothing in the Constitution guarantees a criminal defendant the right to trial by a judge and that "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." *Id.* at 34-35. *Singer* stands only for the proposition that both the prosecution and trial court have rights—which are not the defendant's to waive—to insist upon a jury trial. *Id.* at 36.

[10] *Taylor v. United States*, 414 U.S. 17, 19 (1973); *Illinois v. Allen*, 397 U.S. 337, 343 (1970); *Diaz v. United States*, 223 U.S. 442, 450-51 (1912).

[11] *Rees v. Peyton*, 384 U.S. 312 (1966).

[12] *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 164 (1973) (Douglas, J., concurring). *See also Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) ("the Bill of Rights is designed to secure individual liberty"); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring) ("the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities").

terests of the State.[13] The Court made precisely this point in holding that the Sixth Amendment forces neither a lawyer nor a jury trial upon a defendant:

> *It hardly occurred to the framers of the . . . Bill of Rights that an accused, acting in obedience to the dictates of self-interest or the promptings of conscience, should be prevented from surrendering his liberty by admitting his guilt* . . . [W]e are asked here to hold that an accused person cannot waive trial by jury . . . unless he acts on a lawyer's advice. . . . [*T*]*he Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if . . . his choice is made with eyes open.* . . . When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, *to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.*[14]

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[13] Petitioner consistently fails to distinguish between decisions reasoning that *state laws* prohibit waivers and contentions that the *Bill of Rights* prohibits a waiver. Thus, petitioner asks whether the "police power of the state to protect its citizens from self-destructive acts can subjugate the individual rights of the citizen." Brief for Petitioner at 18. Petitioner answers in the affirmative, reasoning that the police power of the several States allows them to "control[] many aspects of our daily lives from the speed at which we drive or whether motorcyclists wear helmets to weightier issues of compelled blood transfusions." *Id.* Petitioner's argument ignores the fundamental point that it is not the Bill of Rights, interpreted by the federal courts, that imposes speed limits, motorcycle helmet requirements or blood transfusions. It is the several States, subject to the limits of the United States Constitution, that regulate these activities.

[14] *Adams*, 317 U.S. at 276-79 (emphasis added). *See also* U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

Or, as then Chief Justice Burger reasoned in holding that the First Amendment does not require public broadcasters to accept certain types of material:

Indeed, there are especially compelling reasons that the Bill of Rights ought not forbid a defendant's waiver of appellate review of his own death sentence. Deciding whether to resist the death penalty, and if so how, are intensely personal decisions; they implicate what is literally the very existence of the capital defendant. Moreover, by virtue of their crimes, capital defendants place themselves into the uniquely restrictive environment of death row, where they are permitted only the most limited freedoms.[15] Within this context, it is all the more important that the Bill of Rights not be understood to forbid a capital defendant the liberty to stand and face his sentence. Judge Sneed put the matter well in *Lenhard v. Wolff*, 603 F.2d at 94 (Sneed, J., concurring):

> [The defendant] is an individual who, for reasons I can fathom only slightly, has chosen to forego his federal remedies. Assuming his competence . . . he should be free to so choose. To deny him that would be to incarcerate his spirit—the one thing that remains free and which the State need not and should not imprison.

In short, invoking the Eighth Amendment to require mandatory appellate review of all capital sentences stands the Bill of Rights on its head, turning a charter for in-

> [I]t would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licenses are subject to the kind of restraints urged by respondents. *To do so in the name of the First Amendment would be a contradiction.*

CBS v. Democratic Nat'l Comm., 412 U.S. 94 (Burger, C.J., plurality opinion) (emphasis added). *See also id.* at 139 (Stewart, J., concurring) ("The First Amendment protects the press *from* governmental interference; it confers no analogous protections *on* the Government.") (emphasis in original); *id.* at 162 (Douglas, J., concurring).

[15] *Cf. Hewitt v. Helms*, 482 U.S. 755 (1987); *Bell v. Wolfish*, 441 U.S. 520, 545-46 (1979).

dividual liberties into an instrument of governmental coercion. Such a result ought not lightly be reached and, as we show below, petitioner's arguments fall far short of justifying any such novel reading of the Eighth Amendment. Indeed, mandatory appellate review of capital sentences would frustrate important governmental interests, while offering only marginal and uncertain enhancements in the reliability of capital sentencing.

B. Permitting Waivers of Appellate Review of Capital Sentences Advances Important State Interests.

By permitting capital defendants to waive appellate review of their sentences, a State advances a number of vital interests. First, waivers of appellate review facilitate the prompt execution of capital sentences. The importance of this interest to the States has frequently been emphasized.[16] And of course, the families and loved ones of those who die by violent crime—like the McNultys in this case—have a compelling interest in finally laying to rest the tragic events surrounding a murder.

Second, permitting waivers of appellate review enables a State tangibly to acknowledge a capital defendant's expressions of remorse and his acceptance of society's punishment. It is of course undeniable that the brutal atrocities committed by capital defendants must ultimately set them apart from civilized society: "When a man is hung, there is an end to our relations with him. His execution is a way of saying 'You are not fit for this world, take your chance elsewhere.' " [17]

Nevertheless, a State may quite properly allow a defendant to accept his punishment in an effort to redeem

[16] *E.g., Barefoot v. Estelle*, 463 U.S. 880, 887-88 (1983); *Lenhard v. Wolff*, 443 U.S. 1306, 1307 (1979) (Rehnquist, J., in chambers). *See also* Judicial Conference of the United States, Ad Hoc Comm. on Fed. Habeas Corpus In Capital Cases, Comm. Rep. and Proposal at 1, 7 (Aug. 23, 1989).

[17] *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring) (quoting Stephen, *Capital Punishments*, 69 Fraser's Magazine 753, 763 (1864)).

what one capital defendant termed his "last vestige of dignity." [18] Some capital defendants—like Ronald Gene Simmons in this case—eventually come to express remorse for their crimes and acceptance for their sentences. In the proceedings below, Simmons said "I want no action that will delay, deny, defer or denounce this very correct and proper death sentence. . . . [I]n my particular case anything short of death would be cruel and unusual punishment . . . I only ask for what I deserve." *Franz v. State*, 754 S.W.2d at 844. Similarly, in a California case, the defendant's lawyer asked, "What can [the defendant] say to . . . what's left of the family of his victims. He virtually wiped out a family, a father and two small children. . . . The only thing he can do is to say 'I accept full responsibility for what I did.'" [19]

There is no reason to ignore voluntary expressions of culpability by capital defendants, nor to treat them as the somehow inherently unreliable products of disturbed minds.[20] On the contrary, we should welcome a brutal

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[18] *People v. Deere*, 710 P.2d at 929. *See also* Urofsky, *A Right to Die: Termination of Appeal For Condemned Prisoners*, 75 J. Crim. L. & Criminology 553, 554 (1984) (quoting Gary Gilmore: "when I accept this most extreme punishment with grace and dignity, you, the people of Utah want to back down and argue with me about it").

[19] *People v. Deere*, 710 P.2d at 929. *See also People v. Stanworth*, 71 Cal. 2d 820, 457 P.2d 889, 896 n.13, 80 Cal. Rptr. 49 (1969) ("I and I alone must suffer for my acts and I understand also that the law holds me to task for my actions.").

[20] The premise for waivers of appellate review of capital sentences is, of course, an affirmative showing of the competence of the defendant and the voluntariness of his waiver. *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988); White, *supra* at 867. As the Arkansas Supreme Court concluded, a proper inquiry into the defendant's competence examines whether the defendant has "the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence." *Franz v. State*, 754 S.W.2d at 843. The standard properly focuses upon the character of the defendant's waiver and the

killer's ultimate realization of the enormity of his crimes and his acceptance of society's judgment. As the Court has held in the guilty plea context, there is an independent value in giving the defendant "the chance to acknowledge his guilt" and promptly face his punishment.[21]

C. Permitting Waivers of Appellate Review of Capital Sentences Does Not Appreciably Impair the Reliability of Capital Sentencing.

Petitioner devotes considerable effort to showing that the lack of mandatory appellate review unacceptably compromises the reliability of capital sentencing procedures.[22] Since *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court has discerned various principles of procedural regularity in the Eighth Amendment's prohibition against "cruel and unusual" punishments. These principles have required, first, that sentencing authorities not be permitted unbridled discretion in imposing capital sentences, but that they instead be provided with legislative direction that

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likely consequences of his choice, as well as upon the possible effects of death row confinement upon the voluntariness of the defendant's decision. *See White, supra* at 867-68.

[21] *Blackledge v. Allison*, 431 U.S. at 71. *See Brady v. United States*, 397 U.S. 742, 748 (1970).

[22] There is no reason in this case to consider the district court's rhetorical hypothetical: "If a state court sentenced a defendant to be boiled in oil, and the defendant, for whatever reason, declined to object, would a horrified nation be forced to stand by while the sentence was carried out?" *Franz v. Lockhart*, 700 F. Supp. 1005, 1023 (E.D. Ark. 1988). Even assuming that such a decision would ever be competently and voluntarily made, it is clear that the balance of State interests and Eighth Amendment concerns in the district court's hypothetical is entirely divorced from that in the present case. Here, unlike the hypothetical, a substantively permissible punishment is to be carried out following a sentencing proceeding pursuant to a state statute that afforded all of the trial and sentencing phase protections required by the Eighth Amendment. Thus, the defendant's waiver advances entirely legitimate State interests and, as we explain below, *infra* pp. 13-19, does not appreciably impact upon Eighth Amendment concerns about procedural regularity or substantively permissible punishments.

prevents arbitrary or freakish imposition of capital sentences.[23] And second, the Eighth Amendment has also been understood to guarantee a capital defendant's right to introduce mitigating evidence regarding his character at the sentencing phase.[24] These general principles have been reflected in a variety of specific procedural safeguards, including bifurcated guilt-sentencing procedures,[25] statutory enumeration of aggravating and mitigating circumstances,[26] and broad scope for the submission of mitigating evidence.[27]

Importantly, the various procedural safeguards adopted in *Gregg* and its progeny have never been viewed as ends unto themselves. They have instead served as means of avoiding "arbitrary" or "freakish" decisions whether "death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Moreover, this Court has repeatedly recognized that "[a]ny capital sentencing scheme may occasionally produce aberrational outcomes." [28] Viewed in this context,

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[23] *Pulley v. Harris*, 465 U.S. 37, 45 (1984); *Gregg v. Georgia*, 428 U.S. at 206-07 (plurality opinion of Justices Stewart, Powell, and Stevens), 220-21 (White, J., concurring).

[24] *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982).

[25] *Gregg v. Georgia*, 428 U.S. 153; *Proffitt v. Florida*, 428 U.S. 242 (1976).

[26] *Gregg v. Georgia*, 428 U.S. 153; *Proffitt v. Florida*, 428 U.S. 242.

[27] *Lockett v. Ohio*, 438 U.S. 586; *Eddings v. Oklahoma*, 455 U.S. 104.

[28] *Pulley v. Harris*, 465 U.S. at 54. *See McCleskey v. Kemp*, 481 U.S. 279, 307 n.28, 313 (1987) (quoting *Singer v. United States*, 380 U.S. at 35) ("The Constitution is not offended by inconsistency in results based on the objective circumstances on the crime"; "any mode for determining guilt or punishment 'has its weaknesses and the potential for misuse'"); *Lockett v. Ohio*, 438 U.S. at 605 ("There is no perfect procedure for deciding in which cases governmental authority should be used to impose death."); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) ("not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment.").

it is clear that permitting waivers of appellate review does not unacceptably impair the reliability of capital sentencing.

First, the capital sentence in this case was imposed pursuant to a procedure that—apart from the issue of appellate review—manifestly exceeds the requirements of *Gregg* and its progeny.[29] Under the Arkansas capital sentencing statute—which has been repeatedly upheld against Eighth Amendment challenges—a death sentence may be imposed only by a jury after a bifurcated trial at which guilt and sentencing are considered separately. Ark. Code Ann. § 5-4-602 (1987). Only defendants found guilty of capital murder are potentially subject to the death penalty. Ark. Code Ann. § 5-4-608 (1987). The jury hears evidence concerning both mitigating and aggravating circumstances, which are statutorily defined in order to channel the jury's discretion. Ark. Code Ann. § 5-4-604 (1987). The defendant, of course, can present a broad range of evidence in mitigation. Ark. Code Ann. §§ 5-4-602(4) & 5-4-605. The jury may impose the death sentence only if it unanimously returns written findings that specific aggravating circumstances existed beyond a reasonable doubt, that these aggravating circumstances outweigh any mitigating circumstances beyond a reasonable doubt, and that the aggravating circumstances justify a sentence of death beyond a reasonable doubt. Ark. Ann. Code § 5-4-603 (1987).

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[29] The Arkansas laws establishing procedural requirements for capital sentencing reside in §§ 5-4-601 through 5-4-617 of the Arkansas Code. Ark. Code Ann. § 5-4-617 (1987). These capital sentencing provisions have been repeatedly upheld against constitutional challenge. *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (en banc), *cert. denied*, 434 U.S. 878 (1977); *Franz v. State*, 754 S.W.2d 839. Thus, this case does not implicate the concerns raised by Justice White's dissent in *Gilmore v. Utah*, 429 U.S. 1012, 1018 (1976), where "the state courts [had not] resolved the obvious, serious doubts about the validity of the [Utah] Statute." *Id.* at 1018 (White, J., dissenting).

"The trial judge is not required to impose the death penalty in every case in which the jury verdict prescribes it." *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106, *cert. denied*, 434 U.S. 878 (1977). *See* Ark. Code Ann. § 16-90-107(c) (1987). For up to thirty days following the verdict, information relevant to the appropriateness of the sentence may be presented to and considered by the court. Ark. Code Ann. § 16-90-105(b) (1987). When the defendant appears for sentencing, the court must ask him whether he has any legal reason why sentence should not be pronounced against him. Ark. Code Ann. § 16-90-106(b) (1987). The defendant then has an opportunity to present any grounds he may have for a new trial or arrest of judgment. Ark. Code Ann. § 16-90-106(c) (1987). Even after the sentencing phase of the trial has passed, the court may make any additional reviews of constitutional objections to the death penalty under Rule 37 of the Arkansas Rules of Criminal Procedure providing for post-conviction relief.[30]

In short, the trial and sentencing phases of the Arkansas statute are fully consistent with this Court's decisions in *Gregg* and its progeny. And of course, any capital sentence is imposed by a jury of the defendant's peers, and adopted by a judge, both cognizant of the "truly awesome responsibility of decreeing death for a fellow human." *McGautha v. California*, 402 U.S. 183, 208 (1971). As a result, there is scant reason for believing that capital sentences imposed by Arkansas sentencing juries and judges will be "freakish" or "arbitrary."

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[30] In addition, Rule 36.1 of the Arkansas Rules of Criminal Procedure provides that "[a]ny person convicted of a misdemeanor or felony by virtue of a trial in any circuit court in this state has the right to appeal to the Arkansas Court of Appeals or to the Supreme Court of Arkansas." The defendant must be informed of this right when the sentence is announced and judgment entered. Ark. Code Ann. § 16-90-105 (1987). Rule 36.4 requires the Arkansas Supreme Court to review the entire record for any errors prejudicial to the appellant's right, where either a capital sentence or imprisonment for life has been imposed.

Second, while requiring that appeals be taken in all capital cases might theoretically enhance the reliability of Arkansas' capital sentencing process, any such enhancement would at best be both marginal and uncertain. This Court has long recognized the general rule that nothing in the Constitution requires a right of appeal in criminal cases.[31] It is true that the Court has quite explicitly acknowledged the availability of appellate review as one of many factors that contribute to the constitutionality of contemporary capital sentencing procedures.[32] Nonetheless, the Court has been equally clear in leaving open the question whether even the availability of appellate review is constitutionally required.[33] And just last Term, in *Murray v. Giarratano*, 109 S. Ct. 2765, 2769 (1989), the Court expressly recognized that the trial phase of the capital sentencing process provides our principal assurance of procedural regularity. As Chief Justice Rehnquist put it, "[t]he additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed." [34]

The need for and efficacy of appellate review of capital sentences is limited because of the character of the sen-

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[31] *See Ross v. Moffitt*, 417 U.S. 600, 611 (1974); *McKane v. Durston*, 153 U.S. 684, 687-88 (1894) ("A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law.").

[32] *E.g., Gregg v. Georgia*, 428 U.S. at 206-07 (plurality opinion of Justices Stewart, Powell, and Stevens).

[33] *Compare Pulley v. Harris*, 465 U.S. at 47 *with id.* at 54 (Stevens, J., concurring) (Eighth Amendment requires "meaningful appellate review"). *See also Proffitt v. Florida*, 428 U.S. at 260-61 (Stewart, J., concurring). In *Pulley v. Harris*, the Court held that there is no Eighth Amendment requirement for proportionality review—which constitutes a principal feature of most mandatory appellate review statutes. *Pulley v. Harris*, 465 U.S. at 47.

[34] *Murray v. Giarratano*, 109 S. Ct. at 2770-71 (Rehnquist, C.J., plurality opinion).

tencing process. The decision to impose death is a communal, moral judgment: it "express[es] the conscience of the community on the ultimate question of life or death."[35] The Court has repeatedly observed that capital sentences rest on countless factors and involve "uniquely human judgments that defy codification." *McCleskey v. Kemp*, 481 U.S. at 302. These sorts of decisions are inherently difficult subjects of appellate review.[36] For these reasons, many commentators have observed that appellate review of capital sentencing decisions cannot play a central role in contributing to the reliability of the overall sentencing process.[37]

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[35] *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). *See also California v. Brown*, 479 U.S. 538, 545 (1987) ("*Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant."); *Sumner v. Shuman*, 483 U.S. 66, 76 n.5 (1987) (quoting *California v. Brown*, 479 U.S. 538) ("[P]unishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime."); Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305, 321 n.69 ("a judge or jury's decision to kill is an intensely moral, subjective matter that seems to defy the designers of general formulas for legal decisions").

[36] *See Zant v. Stephens*, 462 U.S. at 883; *Id.* at 902 (Rehnquist, J., concurring) ("sentencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does"); *Barclay v. Florida*, 463 U.S. 939 (1983); *California v. Ramos*, 463 U.S. 992 (1983) ("myriad" factors); White, *supra* at 865-66 (". . . the death penalty determination is fundamentally different from the guilt determination. The guilt determination is essentially concerned with findings of fact; the penalty determination, on the other hand, is essentially a discretionary judgment whether the defendant should be sentenced to life imprisonment or death. . . . Determining whether an aggravating circumstance is present is generally quite simple.").

[37] Dix, *Appellate Review of the Decision to Impose Death*, 68 Geo. L.J. 97, 123, 141, 158, 159-60 (1979) ("the failure of appellate review reflects the impossibility of the underlying task");

Third, and even more importantly for this case, the likelihood that appellate review will enhance sentencing reliability is especially remote where the defendant refuses to cooperate with—and actively opposes—"his" defense counsel. Even at the appellate level, a client's refusal to cooperate significantly affects a lawyer's ability to marshal and present a case, while the defendant's affirmative approval of his capital sentence necessarily and properly will affect the judgment of any tribunal.

And most fundamentally, appellate review is at bottom a procedural means to the ultimate Eighth Amendment end of ensuring that capital sentences are imposed only in appropriate cases. *See Woodson v. North Carolina*, 428 U.S. at 305. It bears emphasis that, assuming competency, it is the capital defendant who will often know his crimes and personal culpability far better and more concretely than any appellate court of law can grasp. Where the defendant freely and voluntarily accepts a capital sentence imposed by the trial court, he himself provides compelling evidence that the sentencing decision is appropriate.[38] Put differently, a competent defendant's voluntary conclusion that *his own* capital sentence is not "cruel" must surely be entitled to substantial weight in any Eighth Amendment analysis.

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The Court has long respected the freedom of the individual States to fashion local solutions to moral and political questions like those presented in this case. Even

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Weisberg, *supra* at 321, n.69 ("Although the [*Gregg*] opinion lauds the availability of appellate review, the informality of the procedures in the penalty trial ensures that there is not a great deal of legal error for the appellate court to correct.").

[38] *Cf. Brady v. United States*, 397 U.S. at 748 ("Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself.").

in the *Gregg-Jurek-Proffitt* trilogy, the plurality abjured any intention of promulgating some model capital-sentencing procedure.[39] And more recently, the Court has emphasized its "unwilling[ness] to say that there is any one right way for a State to set up its capital sentencing scheme." [40]

This unwillingness to dictate particular procedures for State capital sentencing statutes reflects fundamental principles of federalism.[41] It is, of course, hornbook law that the Court "presume[s] the validity" of state law and that "a heavy burden rests on those who would attack the judgments of the representatives of the people." *Gregg v. Georgia*, 428 U.S. at 175. More recently, the Court has emphasized the importance of "[c]onsiderations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of a particular State, the moral consensus concerning the death penalty and its social utility as a sanction." *McCleskey v. Kemp*, 481 U.S. at 302 (quoting *Gregg v. Georgia*, 428 U.S. at 179-80).

There are compelling reasons for deferring to the judgments of individual States in the present case. As we have explained above, a constitutionally imposed rule of mandatory appellate review would require States to abandon a number of significant public policies served by waivers of appellate review. At the same time, such a rule would at best offer only a marginal and uncertain enhancement in sentencing reliability. In these circumstances, it would be an unjustified departure from our historic respect for individual autonomy to interpret

[39] *Gregg v. Georgia*, 428 U.S. at 195 ("We do not intend to suggest that only the above-described procedures would be permissible under *Furman*.").

[40] *Spaziano v. Florida*, 468 U.S. 447, 464 (1984); *McCleskey v. Kemp*, 481 U.S. at 302.

[41] *See Furman v. Georgia*, 408 U.S. at 417-18 (Powell, J., dissenting); *Id.* at 465-70 (Rehnquist, J., dissenting); R. Berger, *Death Penalties: The Supreme Court's Obstacle Course* 5-6 (1982).

the Eighth Amendment—originally framed to protect individuals from *federal* governmental coercion—to forbid an individual from voluntarily exercising a liberty guaranteed by State law.[42]

II. THE CONSTITUTIONALITY OF WAIVERS OF APPELLATE REVIEW OF CAPITAL SENTENCES IS NOT ALTERED BY THE CURRENT PRACTICES IN VARIOUS STATES.

Perhaps because the validity of the Arkansas capital sentencing process under ordinary methods of constitutional analysis is so clear, petitioner places principal reliance upon the supposed "fact" that 36 out of 37 States have rejected Arkansas' approach to waivers of appellate review. Even accepting petitioner's characterization of the capital-sentencing statutes of the several States,[43] a mechanical tally of State laws is of virtually no constitutional significance in the present case. In making use of

[42] This case presents the question whether the Eighth Amendment *requires* States to provide mandatory appellate review of capital sentences; it does not present the question whether the Eighth Amendment *forbids* States from requiring mandatory appellate review. We think it would be clear, however, that a State's legislative enactment of a nonwaivable appeal for the benefit of capital defendants would be consistent with the Eighth Amendment. *See North Carolina v. Alford*, 400 U.S. 25, 38-39 & n.11 (1970) ("A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court."); *Singer v. United States*, 380 U.S. 24 (1965). *Compare Faretta v. California*, 422 U.S. 806 (1975).

[43] In point of fact, the courts of only 7 States have actually considered whether local law forbids waivers of appellate review. It may well be that the courts of all 36 States, except Arkansas, would ultimately require mandatory appellate review over a defendant's opposition. But particularly in light of our long-standing commitment to individual autonomy and responsibility, this result ought not lightly be presumed from even arguably ambiguous statutory language. Nor should it necessarily be assumed that mandatory appellate review would be consistent with State constitutional guarantees of individual liberties. Responsibility for the interpretation of State laws lies with State courts, and the federal courts are properly reluctant to intrude upon this domain.

tallies of State statutes, this Court's decisions draw a clear distinction between cases involving *substantive* Eighth Amendment rights and those involving *procedural* Eighth Amendment safeguards. Thus, the Court has on several occasions relied upon a tally of State statutes to strike down capital punishment for certain offenses or defendants as cruel and unusual.[44] In contrast, where procedural safeguards are involved, the Court has relied on its own constitutional analysis, upholding laws even when the overwhelming majority of the States follow different procedures.[45]

The foregoing distinction between substantive and procedural issues is fully consistent with the relative institutional competence of the federal courts in resolving different types of legal questions. The judiciary's competence is particularly great in assessing the fairness and efficacy of procedural protections.[46] In contrast, there is considerably greater question about the ability of the federal courts to pass judgment upon the legitimacy of substantive rules, at least without meaningful Constitutional guidance.[47] And finally, it would be unusual, and troubling, to hold that the Bill of Rights' entrenched protections for individual freedom are somehow dictated by a poll of the statutes currently prevailing in a majority of the several states.

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[44] *E.g., Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (death penalty for 15-year old); *Enmund v. Florida*, 458 U.S. 782 (1982) (death penalty for persons not involved in murder); *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty for rape of adult woman).

[45] *See Pulley v. Harris*, 465 U.S. at 71 (Brennan, J., dissenting) (proportionality review, which, as dissent observed, was used in more than 30 States, is not required by Eighth Amendment); *California v. Ramos*, 463 U.S. 992 (jury instructions mentioning possibility of parole, condemned in 25 of 28 States, not violative of Eighth Amendment); *Spaziano v. Florida*, 468 U.S. 447 (judge's override of jury's refusal to impose death penalty, prohibited in 33 of 37 States, does not violate Eighth Amendment).

[46] J. H. Ely, *Democracy and Distrust* 21 (1980).

[47] *See Lochner v. New York*, 198 U.S. 45 (1905).

III. PETITIONER LACKS STANDING TO INTERFERE WITH THE THE ARKANSAS CAPITAL SENTENCING PROCESS.

Claims that the Constitution has been violated, no matter how deeply-held, do not necessarily confer jurisdiction upon the federal courts. Rather, the federal judicial power is limited by Article III to actual cases and controversies. The standing requirements of Article III require a plaintiff to show, at a minimum, that he has suffered "a distinct and palpable injury to himself," which "fairly can be traced to the challenged action" and which "is likely to be redressed if the requested relief is granted."[48] Petitioner Jonas Whitmore, a convicted murderer and death row inmate, advances several alternative theories in support of his claim to act on behalf of respondent Ronald Gene Simmons. As we show below, none of these theories is plausible.

Petitioner suggests first that he has standing by virtue of his "direct and substantial interest" in having Simmons' crimes included in the Arkansas "data base against which his crime is compared." Brief for Petitioner at 21. This claim plainly fails to satisfy Article III's minimum requirement that petitioner have suffered some distinct and palpable injury as a result of the constitutional violation he alleges. Jonas Whitmore was not sentenced to death because Ronald Gene Simmons waived appellate review. He was sentenced to death because he robbed and brutally murdered an innocent woman.[49] It is entirely

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[48] *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

[49] *Whitmore v. State*, 296 Ark. 308, 316, 756 S.W.2d 890, 895 (1988). Whitmore filed an appeal from his conviction which was automatically accepted and reviewed by the Arkansas Supreme Court. In confirming the lower court verdict, the Arkansas Supreme Court made a comparative review of the "wickedness, inhumanity, and heinousness of [Whitmore's] capital case with other capital

speculative to suggest that adding one case to the Arkansas capital sentence data bank would affect the validity of this judgment. Petitioner's claim offers nothing more than "the remote possibility, unsubstantiated by allegations of fact, that [his] situation might have been better had [Simmons] acted otherwise." [50]

Second, petitioner asserts that he should be excepted from the traditional "rules of practice" governing standing because he is an Arkansas citizen who shares a weighty "societal right" not to have an execution carried out arbitrarily and capriciously in his State. This Court's Article III decisions completely foreclose petitioner's argument.[51] "The federal courts have abjured appeals to their authority which would convert the judicial process

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cases." *Whitmore*, 756 S.W.2d at 895. The court held that the robbery-murder of Whitmore's victim was similar to the robbery-murders in two other recent state cases also resulting in the imposition of the death penalty.

[50] *Warth v. Seldin*, 422 U.S. 490, 507 (1975). *See also Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973) (claim by mother that prosecution of child support statute against father would result in payment of child support is "only speculative"); *Simon*, 426 U.S. at 41 (1976) (claim that favorable tax ruling encouraged hospitals not to treat indigents was not "fairly . . . traced to the challenged action of the defendant"); *Franz v. Lockhart*, 700 F. Supp. 1005, 1010 (E.D. Ark. 1988).

In addition, any injury suffered by Whitmore is not "fairly traceable" to Simmons' waiver of appellate review. Rather, it is traceable to Arkansas' practice of excluding sentences which are not appealed from its comparative review data base. Arkansas is, of course, not required to include any particular cases within its data base, nor even to provide proportionality review. *Pulley v. Harris*, 465 U.S. 37. There is no reason to believe that, if mandatory appellate review of capital sentences were constitutionally required, Arkansas would include cases where the defendant supports his sentence.

[51] *See Valley Forge Christian College*, 454 U.S. at 482-87; *Flast v. Cohen*, 392 U.S. 83 (1968); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166, 179-80 (1974).

into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.' " [52]

Finally, petitioner claims standing as "next friend" of Ronald Gene Simmons. At a minimum, two requirements must be met for next friend standing. First, the person on whose behalf the plaintiff acts must suffer from some disability that prevents a direct action. Second, the petitioner must demonstrate that he is in fact a "next friend." *See Singleton v. Wulff*, 428 U.S. 106, 115 (1976); *Davis v. Austin*, 492 F. Supp. 273 (N.D. Ga. 1980).

There is no indication at all in this case that Simmons cannot act competently on his own behalf. Indeed, Simmons has had three separate competency evaluations in which he was repeatedly found competent to fully understand the nature and effect of his waiver of appellate review and to have made a "knowing and intelligent waiver of any and all rights to appeal his sentence." *Simmons v. State*, 298 Ark. 193, 766 S.W.2d 422, 423, *cert. granted*, *Whitmore v. Arkansas*, 109 S. Ct. 3240 (1989). Simmons' undeniable competency should foreclose any claim of next friend standing by petitioner Whitmore. This at least was the Court's conclusion in both *Gilmore v. Utah*, 429 U.S. 1012 (1976), and *Lenhard v. Wolff*, 443 U.S. 1306 (stay granted) and 444 U.S. 807 (1979).[53]

Indeed, even if the Eighth Amendment affirmatively prohibits Simmons from waiving appellate review, there

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[52] *Valley Forge Christian College*, 454 U.S. at 473 (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)).

[53] In *Gilmore* the Court allowed the defendant's execution to go forward on the grounds that he had "made a knowing and intelligent waiver of any and all federal rights he might have asserted after the Utah trial court's sentence was imposed." 429 U.S. at 1013. Four Justices went further and expressly concluded that Gilmore's voluntary and competent waiver barred "next friend" standing. *Id.* at 1016 (Burger, C.J., concurring); *id.* at 1017 (Rehnquist, J., concurring).

is no basis for third party standing in this Court.[54] Quite apart from the Bill of Rights, Article III itself "reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order." *Valley Forge Christian College v. Americans United For Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982). Put differently, Article III's standing requirement serves "to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).

Unlike some other capital defendants who have waived appellate review,[55] Simmons continues to urge affirmance of his sentence in this Court. Allowing next friend standing in these circumstances trenches significantly upon Simmons' autonomy: regardless of how "worthy and high minded the motive of 'next friends' may be, they inevitably run the risk of making the actual defendant a pawn to be manipulated on a chessboard larger than his own case." *Lenhard v. Wolff*, 443 U.S. at 1312. Article III's standing requirement serves in part to prevent precisely such results.

Even assuming that Simmons is deemed legally incompetent to defend his waiver, Whitmore has plainly failed

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[54] In the First Amendment context, the Court has allowed third party standing where the person "actually engaged in the protected activity [may] . . . refrain from engaging further in the protected activity" rather than risk punishment. *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984). Simmons is in no way deterred from litigating here on his own behalf. Rather, he simply has expressed his intent to waive his right of appeal. Likewise, this is not a case where it is "difficult if not impossible for the persons whose rights are asserted to present their grievances before any court." *Barrows v. Jackson*, 346 U.S. 249, 257 (1953). Simmons has instead merely refused to assert his right to appeal.

[55] *E.g., Evans v. Bennett*, 440 U.S. 1301, *cert. denied*, 440 U.S. 987 (1979); *Smith v. Armontrout*, 812 F.2d 1050, 1052 (8th Cir.), *cert. denied*, 483 U.S. 1033 (1987).

to meet the relational requirement for next friend standing. Appropriate persons to maintain next friend actions are "close relatives, such as a parent, spouse, or sibling, who maintain a close personal relationship with the aggrieved." [56] Petitioner Whitmore's only claimed relationship to Simmons is as a fellow death row inmate. This in no way satisfies the historic requirement of a close and enduring personal relationship.

CONCLUSION

"One of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder." *McCleskey v. Kemp*, 481 U.S. at 297 (quoting *Gregg v. Georgia*, 428 U.S. at 226 (White, J., concurring)). Tragically, our society has in recent decades fundamentally breached its obligation to protect the lives of American citizens. Americans of all walks and stations of life have been subjected to a brutal, ever-escalating tide of violence and murder that is simply incomprehensible: there were 16,689, 17,545 and 19,527 reported murders in the United States in 1984, 1985 and 1986—a toll of 50 human lives every single day of the year.[57] The human and spiritual losses that these figures reflect cannot too long be endured by a civilized people. Here, a jury and judge of the State of Arkansas, acting pursuant to a presumptively valid State statute, have concluded that the crimes committed by Ronald Gene Simmons are beyond the endurance of civilized society. Simmons has voluntarily and competently agreed with that judgment. Nothing in the Eighth Amendment forbids this choice.

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[56] *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839, 841 (1988) (quoting *Davis v. Austin*, 492 F. Supp. 273, 275 (N.D. Ga. 1980)).

[57] U.S. Department of Commerce, *Statistical Abstract of the United States 1988* 160.

For the foregoing reasons, the decision of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted,

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